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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL W. GLUESENKAMP,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether the Fourth and Fourteenth Amendments permit the arbitrary and unreasonable stopping of certain vehicles that fit into a subjective profile that government officials deem likely to contain products subject to regulation by the Florida Department of Agriculture when there is neither reasonable suspicion nor probable cause to believe the vehicles contain any proscribed products where the state's interest in agricultural regulations does not outweigh the resulting intrusion on the privacy and security of the persons detained.

2. Whether the court below erred in upholding the warrantless search and seizure of a vehicle in the absence of probable cause, exigent circumstances or articulable

suspicion.

3. Whether he court below erred by failing to base its decision on the Motion to Suppress on facts contained in the record.

4. Whether the state statute which allows law officers to arbitrarily stop certain vehicles violates the Fourth and Fourteenth Amendments to the United States Constitution in that:

(a) the classification of regulated vehicles is arbitrary and unrelated to the purpose of the statute in violation of the Equal Protection clause;

(b) the statute violates the Privileges and Immunities and Commerce Clause of the Fourteenth Amendment; and

(c) the statute is vague and overbroad in that it leaves the enforcement of the statute in the unbridled discretion of law enforcement officers and fails to give persons of ordinary intelligence fair notice of the proscribed conduct.

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 8

REASONS FOR ALLOWING THE WRIT. . . . 27

I. THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND THE UNITED STATES CONSTITUTION IN THAT IT UPHOLDS A SEIZURE AND SEARCH BASED ON THE ARBITRARY AND UNREASONABLE STOPPING OF PETITIONER'S VEHICLE THAT FIT A SUBJECTIVE PROFILE OF VEHICLES THE GOVERNMENT DEEMED LIKELY TO CONTAIN PRODUCTS SUBJECT TO REGULATION BY THE FLORIDA DEPARTMENT OF AGRICULTURE WHEN THERE WAS NEITHER REASONABLE SUSPICION NOR PROBABLE CAUSE TO BELIEVE THE VEHICLE CONTAINED ANY PROSCRIBED PRODUCTS WHERE THE STATE'S INTEREST IN AGRICULTURAL REGULATIONS DID NOT OUTWEIGH THE RESULTING INTRUSION ON THE PRIVACY AND SECURITY OF THE PERSONS DETAINED. 27

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS WITH LOWER COURTS THAT CONTINUE TO ERODE THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST WARRANTLESS VEHICLE SEARCHES AND SEIZURES IN ABSENCE OF EITHER PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES. 37

III. THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND WELL FOUNDED PRINCIPLES OF APPELLATE REVIEW IN THAT THE EVIDENCE FAILS TO SUPPORT THE OPINION OF THE FLORIDA SUPREME COURT 43

IV. THE DECISION BELOW UPHOLDING THE CONSTITUTIONAL VALIDITY OF THE STATE STATUTE WHICH ALLOWS ARBITRARY STOPS BY GOVERNMENT OFFICIALS WITHOUT ARTICULABLE SUSPICION OR PROBABLE CAUSE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE FOURTEENTH AMENDMENT, AND CONTRARY TO THE UNITED STATES CONSTITUTION. . . . 48

CONCLUSION 64

TABLE OF AUTHORITIES

Cases . . . . . Pages

Alladin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980) 56

Almeida Sanchez v. United States, 413 U.S. 266 (1973) 30,31

Arkansas v. Sanders, 442 U.S. 753 (1979) 46

Brock v. Florida, ___So.2d.____ (1981) (Fla. S. Ct. # 57, 718 3/5/81). 42

Cady v. Dombrowski, 413 U.S. 433 (1973) 33

Camara v. Municipal Court, 387 U.S. 523 (1967) 29,35

Chambers v. Maroney, 399 U.S. 42 (1970) 38,42,45

Cline v. Frink Davis Co., 274 U.S. 445 (1928) 62

Colonnade Catering Corporation v. United States, 397 U.S. 72 (1970) 33

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 38,42,44

Connally v. General Construction Company, 269 U.S. 385 (1926) 64

Pages

Cox v. Lousiana, 379 U.S. 536 (1965) 60

Cramp v. Board of Education 368 U.S. 278 (1961). 60

Davis v. Weir, 497 F.2d 139 (5th Cir. 1974). 49

Delaware v. Prouse, 440 U.S. 648 (1979) 28,29,30 32,35,59

Dorough v. Estelle, 457 F.2d 1007 (5th Cir. 1974) 56

Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 47

Edwards v. California, 314 U.S. 160 (1941) 58

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 60

Katz v. United States, 389 U.S. 347 (1967) 38

M. Kraus and Brothers v. United States, 327 U.S. 614 (1946) 64

Lanzetti v. New Jersey, 306 U.S. 451 (1938). 61

Lo-Ji Sales, Inc. v. New York, 447 U.S. 319, 327 (1979) 45

Pages

Marshall v. Barlow's, 436 U.S. 436 U.S. 307 (1978). 28,33,34 35

Mason v. Lister, 562 F.2d 343 (5th Cir. 1978) 56

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 59,62

Reed v. Reed, 404 U.S. 71 (1971) 49

Reid v. Georgia, U.S.___, 100 S.Ct. 2752 (1980) 36,37

Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976). . .48

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). 50

Shapiro v. Thompson, 394 U.S. 618 (1969) 56

Stephenson v. Department of Agriculture and Consumer Services, 329 So.2d 373 (Fla. 1976) 31,51

Terry v. Ohio, 392 U.S. 1 (1968) . . 32,36

United States v. Biswell, 406 U.S. 311 (1972). 33

United States v. Cardiff, 344 U.S. 174 (1953). 63

Pages

United States v. Chadwick
433 U.S. 1, (1977) 46

United States Department of
Agriculture v. Moreno, 413
U.S. 528, 533 (1973). 50

United States v. Garray
477 F.2d 1306 (5th Cir. 1973) 38

United States v. Harris,
347 U.S. 612 (1954) 61

United States v. L. Cohen
Grocery Co., 255 U.S. 18
(1920) 62

United States v. Mersky,
361 U.S. 431 (1960) 64

United States v. National Dairy
Products, 372 U.S. 29 (1963) 63

United States v. Reese, 92 U.S.
214 (1871) 62

United States v. Shaefer, ___F.2d.
(3rd. Cir. 1980),
28 Cr.L.R. 2386 35,36

United States v. United States
Gypsum Co., 333 U.S. 364 (1948) . . .47

Ward v. Maryland, 12 Wall 418
(1870) 58

Pages

United States Constitution:

First Amendment 5

Fourth Amendment. 5

Fourteenth Amendment. 6

Statutes:

Florida Statutes § 320.06 53

Florida Statues § 570.15 . . . . 6,8,9 16,25,37 42,49,54 61

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1980

No.

DANIEL W. GLUESENKAMP,

Petitioner

v.

STATE OF FLORIDA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

Comes now Petitioner, Daniel W. Gluesenkamp, and respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Florida Supreme Court entered on October 16, 1980, rehearing denied on January 14, 1981.

OPINIONS BELOW

Petitioner was convicted and sentenced on October 12, 1978 in the Circuit Court of Hamilton County, Florida for possession of cannabis in excess of 100 pounds. On October 16, 1980 the Supreme Court of Florida affirmed the conviction and judgment of the trial court. A copy of this opinion is attached to the Appendix accompanying this Petition as Exhibit A. Rehearing was denied on January 14, 1981. A copy of this order is contained in the Appendix accompanying this Petition as Exhibit B.

JURISDICTION

In the case below Petitioner challenged the legality of the search and the validity of Florida Statute § 570.15. After pretrial motions raising these issues were denied, pursuant to Florida Criminal Procedure, Petitioner pled nolo contendere while

reserving his right of appeal on these issues.

On February 8, 1978, a two-count information was filed in the trial court charging Petitioner with possession of cannabis in excess of 100 pounds with intent to sell, and possession of cannabis in excess of 5 grams (App. 43)*. Petitioner subsequently entered his written plea of not guilty (Id.).

Thereafter, Petitioner filed a Motion to Suppress Evidence, and a Motion to Dismiss challenging the constitutionality of Florida Statute § 570.15. On June 16, 1978, the trial court denied the Motion to Suppress (T-101), and on July 17, 1978, the trial court entered a written Order denying the Motion to Dismiss (App. 41).

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*"App." refers to the Appendix filed contemporaneously with this Petition. References to the Motions hearing in the Petition are referred to herein as "T".

On July 25, 1978, Petitioner and his counsel appeared before the Circuit Judge, for the purpose of entering a plea of nolo contendere to Counts I and II of the information, expressly reserving and preserving his right to appeal the trial court's denial of the Motions to Dismiss and Suppress.

On October 12, 1978, the trial court adjudicated Petitioner guilty as charged in the information and imposed a "split" sentence of five (5) years, consisting of eighteen (18) months imprisonment, followed by 3-1/2 years of probation, together with a fine of $5,000.00 (App. 43). Petitioner appealed and on October 16, 1980, the Florida Supreme Court denied Petitioner's appeal (App. 1). A motion for rehearing was denied on January 14, 1981 (App. 38).

Petitioner's Motion to Stay Mandate was denied by the Florida Supreme Court on January 27, 1981 (App. 40), and Petitioner has been incarcerated since February 2, 1981.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particu-

larly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes 570.15 provides:

Access to places of business and vehicles

(1)(a) The commissioner, assistant commissioner, directors, counsel, experts, chemists, agents, inspectors, road-guard inspection special officers, and other employees and officers of the department shall have full access at all reasonable hours to all:

1. Places of business;
2. Factories;
3. Farm buildings;
4. Carriages;
5. Railroad cars;
6. Trucks;
7. Motor vehicles, other than private passenger automobiles with no trailer in

tow, or any vehicle bearing an RV license tag;

8. Truck and motor vehicle trailers;

9. Vessels; and

10. All records pertaining thereto;

used in the production, manufacture, storage, sale, or transportation within the state of any food product; any agricultural, horticultural, or livestock product; or any article or product with respect to which any authority is conferred by law on the department.

(b) If such access be refused by the owner, agent, or manager of such premises or by the driver of such aforesaid vehicle, the inspector or roadguard inspection special officer may apply for and may execute a search warrant, which shall be obtained as provided by law for the obtaining of search warrants in other cases, or may conduct a search of any of the aforesaid vehicles without a warrant pursuant to s.933.19.

(c) Such departmental officers, employees, and road-guard inspection special officers may examine and open any package or container of any kind containing or believed to contain any article or product which may be transported, manufactured, sold, or exposed for sale in violation of the provisions of this chapter, the rules of the department or the laws which the department enforces and may inspect the contents thereof and take therefrom samples for analysis.

(2) It shall be unlawful for any truck or any truck or motor vehicle trailer to pass any official road guard inspection station without first stopping for inspection. A violation of this subsection shall

constitute a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Every law enforcement officer is authorized to assist employees of the department listed in subsection (1) in the enforcement of subsection (2). Such officer is authorized to stop and detain any vehicle and its driver who has failed to comply with subsection (2) until an employee of the department arrives to conduct the inspection required by law. Such law enforcement officer or a road guard inspection special officer may require the driver to return with his vehicle to the road guard inspection station where the driver failed to stop the vehicle for inspection.

(4) No civil or criminal liability shall be imposed upon any person who is authorized to enforce or assist in enforcement of the provisions of this section and who is lawfully engaged in such activity. Amended by Laws 1975, c. 75-215, § 1, eff. July 1, 1975; Laws 1978, c. 78-180, § 1, eff. June 8, 1978; Laws 1979, c. 79-371, § 1, eff. July 3, 1979.

STATEMENT OF THE CASE

Florida Statutes 570.15 (1977) (supp. 1978) allows the commissioner of the Florida Agriculture Department and his employees and agents "access at all reasonable hours"

to all trucks, truck and motor vehicle trailers and motor vehicles, other than private passenger automobiles with no trailer in tow or any vehicles bearing an "RV" license tag. Cars, recreational vehicles and vans equipped as recreational vehicles are exempt. All vehicles that fall within the proscription of the statute must stop at all Inspection Stations along Florida highways (Fla. Statutes 570.15 and 933.19); but absent probable cause and exigent circumstances the statute does not allow a search. Gluesenkamp v. Florida, slip opinion (App. 1).

Petitioner was a passenger in a 1975 GMC van when he was stopped by an employee of the Florida Department of Agriculture (T-29, 32, 79, 89). Florida Agriculture Inspector Perry, as he saw the van drive past the inspection station on Interstate

75 North, made a determination that the van was not a car, recreational vehicle, nor a van equipped as a recreational vehicle (T-26, 27, 28, 29, 36). The van had an Indiana tag where it was properly licensed (T-79). To avoid having to stop at the Florida Inspection Station would have necessitated that it have a Florida "RV" tag. Vans can qualify for Florida "RV" tags. Florida Statutes § 570.15 (App. 48, 50).

Inspector Perry testified that in a normal eight hour shift hundreds of vehicles go by the station and do not stop as required by law (T-38). Perry said that about half of all trucks and 85% of all vans do not stop at the inspection station (T-42); however, Perry testified that all vehicles that violate the statute are not stopped. "If I pursued every vehicle I would probably be out there right now.

There is no way you could get every vehicle." (T-39). Perry said the officers are told to use their own judgement and experience in picking which vehicles to stop (T-39). On cross examination he revealed how he makes his decisions concerning which vehicles to stop:

> Q. [Mr. Jenkins] What goes into that choice? How do you pick and choose out of all those vehicles in violation of the law, how do you pick and choose which ones you are going to actually chase down?

A. [Inspector Perry] It all depends on how everything is situated there at the station. If I'm not busy. If there's not too many trucks on the ramp at the time. If we have everything that we suppose to do done. But everything was slow that day.

Q. But what I'm going at, Mr. Perry, when you've got a bunch of vehicles to choose from that are in violation of the law, you've got to exercise some choice as to certain vehicles, and what I want to know is what in your mind goes into choosing which vehicle to stop?

A. In my mind, is the ones like the panel type vans, or the ones that you couldn't see through. The ones that's got cur-

tains around it and sitting down pretty low.

Q. Not being able to see in it and sitting low are important factors?

A. Right. (T-39).

Perry said that even 60% of those vehicles he does stop do not have proscribed products in their van (T-44).

Cain, the driver of the van when stopped by Inspector Perry, indicated she was not aware that the type of vehicle they were riding in, a GMC van, was required to stop at the station (T-49, 50). This confusion clearly had a rational basis as Perry testified the signs on Interstate 75 notifying the public of the inspection requirements were as follows:

A: [Inspector Perry] The first sign states "Agricultural Inspection Station'. And then the next sign states, 'All trucks and all trailers stop for inspection.' Then the third sign says, 'All trucks and all trailers' and got an arrow pointing at the exit (T-28).

Perry admitted that the signs did not say anything about "vans" (T-43). Yet when Perry stopped Petitioner's vehicle, he described his actions as follows:

> A: [Inspector Perry] I asked her, I said 'Ma'am you failed to stop for the inspection station back there about two miles. And all trucks and trailers and vans, which are considered as trucks, are required to pull in for inspection' (T-29).

Inspector Perry, using an official Florida Department of Agriculture automobile with flashing blue-light, had stopped the vehicle approximately two (2) miles north of the Inspection Station (T-28-29). At the time, Inspector Perry was wearing his official Florida Department of Agriculture uniform with hat, badge and service revolver (T-47-48). Cain had observed the flashing blue-light mounted atop Inspector Perry's vehicle, and immediately pulled

over to the right side of the highway and stopped the vehicle (T-29).

Perry advised Cain that she had failed to stop at the Inspection Station, and she indicated that she was not aware that a van had to stop at the Inspection Station (T-50). Inspector Perry then asked Cain if he could look in the back of the van to see what she was hauling. Cain responded that she was hauling plants. Perry then asked her if she had the "papers on the plants" (T-50).

Cain returned to the van and apparently had a brief conversation with Petitioner. She and Petitioner returned to Perry and she advised Perry that the van was not hauling plants. At that point, Petitioner advised Perry that they were hauling potting soil (T-30). The paperwork apparently was not produced. Perry again inquired if

he could look into the rear of the van, and received a negative response from Petitioner (T-31).

Perry then advised Cain and Petitioner that they would have to return to the Inspection Station with him for inspection (T-31), a distance of approximately ten (10) miles from the location where the van was originally stopped (T-37).

In order to return to the Inspection Station, it was necessary to proceed on the northbound lane to the next exit. Cain stopped the van at a store located at the exit interchange and advised Inspector Perry that she wanted to use the restroom. Inspector Tom Delegal, the shift manager of the Inspection Station who had responded to a radio call from Perry for "back-up" assistance advised Cain that there were facilities back at the Inspection Station

(T-31). Delegal then asked Petitioner if he (Delegal) could take a look into the rear of the van. Again, Petitioner responded in the negative (T-81).

After a brief delay, Petitioner, Cain and the Inspectors returned to the Inspection Station. Again, Inspector Perry asked if he could look into the rear of the van, and again he received a negative response (T-33).

Thereafter (approximately 35 minutes after stopping the van) the caravan arrived at the southbound Inspection Station and Inspector Perry placed Cain under arrest for failure to stop for inspection, a violation of Florida Statutes § 570.15 (2) (T-33, 59). Both Cain's and Petitioner's drivers licenses were taken from them, and they were placed in the Inspection Station (T-84). Perry's actions effectively se-

cured the van, located some 50 yards away (T-83), as Perry related on cross-examination:

Q: [Mr. Jenkins] So, with your consent, he (Appellant) couldn't have gotten in that van and driven off?

A. (Inspector Perry): That van couldn't go no where.

Q. Why couldn't the van go any place?

A. Because I had to find out what was on it before I even let it go (T-58).

After placing Cain under arrest and detaining Petitioner and the van, Perry contacted his Supervisor, Garth Nobles, at his home in Live Oak, Florida, some twenty (20) miles from the Inspection Station (T-59). In turn, the Hamilton County Sheriff's Office was contacted, and that office asked Charles Tompkins, an Investigator with the State Attorney's Office, to accompany Deputy Sheriff Frank Copeland to the Inspection Station to assist in handling the sit-

uation (T-4). Tompkins then contacted Bob Dekle, an Assistant State Attorney in Lake City, Florida and requested that Dekle go to the Inspection Station to advise the law enforcement officers in their handling of the situation, (T-11), and to help in obtaining a search warrant (T-31).

Approximately 45 minutes after Perry contacted him, Nobles arrived at the Inspection Station (T-50). Shortly thereafter, Tompkins arrived, and Dekle arrived approximately 10 to 15 minutes later (T-13).

When Tompkins arrived, he immediatley approached the van and attempted to open it (T-62-63). Finding the door locked, he attempted to look into the van through the window on the passenger's side of the van. Because the glare from the sun on the window made it impossible, Tompkins could not

see inside the van. Therefore, he placed his head against the window and shielded his eyes with his hands in order to look into the van (T-13-14).

Tompkins testified he was able to see inside the van. Tompkins testified he saw a blanket tied on a string behind the seats (T-5), and according to his testimony, because the blanket had slipped away some four or five inches from the passenger side of the van, he was able to see burlap-colored plastic bags in the rear of the van (T-15). Although he could not see what the opaque bags contained, based upon past experiences, Tompkins stated he knew such bags to contain marijuana (T-5). In addition, Tompkins testified he could smell the odor of marijuana emanating from a closed door of the van, by placing his nose up against the door (T-5). He said that he

intentionally began sniffing for marijuana and he smelled it when he came to the door (T-16). Although Tompkins testified on the Motion to Suppress hearing that he told the other officers immediately that he smelled marijuana, he admitted that on a previous occasion he testified, under oath, that the first time he told anyone about smelling marijuana was some three (3) months after the arrests (T-18). Moreover, Tompkins testified that the entire case file of his office (which contained his written report from the day of the incident) had been lost and that the copy of the statement normally submitted to the State Attorney's Office was likewise "missing" (T-18, 21).

Assistant State's Attorney Dekle testified that when he arrived on the scene, he approached the van and was told that he would be able to see the bags by looking

through the passenger window. Because of the glare from the sun, he could not see into the van even with the aid of a coat he held up to shield the sun's glare. Dekle, the investigator, then moved to the windshield of the van, and by having the coat held over the passenger's window and placing his face against the windshield and using his hands as an additional shield, Dekle testified he observed a drawn curtain across the back of the van, behind the seats, and a gap of 6 to 12 inches between the curtain and the left, or driver's side of the vehicle (T-74). Dekle testified he could see through the gap and observed two (2) bags, which he believed to contain marijuana (T-21).

Significantly, Inspector Perry, the officer who originally stopped and detained the vehicle and its occupants, gave yet an-

other version of what could be seen or smelled from outside the vehicle. Perry testified that "the only way you could see in it was from the front" (T-33-34). As to the cargo area behind the curtain, Perry stated:

> A: [Inspector Perry] I couldn't see inside the vehicle. As far as I could see was where the passenger and the driver's seat was. That's as far as I could see. They had a curtain up to shield off the rest of it (T-34).

Perry was likewise unable to perceive the same smell of marijuana that Tompkins was able to obtain, despite Perry being as close as one or two feet from the van at times (T-64). After failing to observe the area behind the curtain, Perry was ordered by the other officers to return to the station and complete his paper work (T-34, 64).

After Dekle, Tompkins, Deputy Copeland and Nobles had been at the inspection Station examining the vehicle for approximatly 30 to 45 minutes (T-62), Tompkins and Dekle entered the Inspection Station and asked Petitioner who owned the van. Petitioner indicated that he was the owner (T-65).

Dekle then told Tompkins that he felt there was probable cause to believe there was marijuana in the van solely on the basis of seeing the burlap bags, and because it was a vehicle, he did not think it would be necessary to obtain a search warrant (T-72). Dekle made it clear that any smell of marijuana did not enter into his probable cause determination (T-71-73). Tompkins then asked the Petitioner for the keys to the vehicle. Again, Petitioner stated that he was not giving permission to search the van (T-7). Tompkins told Peti-

tioner that his permission was not needed because he (Tompkins) was going to search the van even if he had to "pull the door off it" (T-7, 73, 87). Tompkins then assured Petitioner that the act of giving him the keys would not be considered as a consent to search the vehicle (Id.)

Petitioner gave the keys to Tompkins (T-8), who proceeded back to the van, and in the presence of Deputy Copeland, Inspector Perry and Dekle, opened the van, and saw the bags in the rear of the van (T-8). Marijuana was not in plain sight and was not seen until Tompkin opened, and looked into one of the bags and saw what he believed to be marijuana (T-8). Shortly thereafter, Deputy Copeland arrested Cain and the Petitioner, and transported them to the Hamilton County Jail (T-8).

The trial court upheld the statute, saying:

> That section 570.15 of the Florida Statutes is constitutional and that said statute does not generally or as applied to the facts of this case, deprive petitioner of due process or equal protection of the laws. (App.41).

The trial court found probable cause for the search (T-100).

The Florida Supreme Court upheld the validity of the statute applying the "conventional standard" since it found the statute "does not infringe upon any fundamental rights...but is a valid exercise of the police power." (App. 24). The court rejected Petitioner's equal protection arguments although admitting that only "some vans" fall within the statutory definition of a truck and that the distinction was clear and not vague for indefiniteness (App. 13, 14):

> Vans designed to carry cargo are trucks and are required to stop at Agricultrual Inspection Stations. Vans described as passenger vehicles are not. (App. 16).

As to the search and seizure the Florida Supreme Court found probable cause:

> We believe, however, that the conduct of Cain and Gluesenkamp in illegally proceeding past the inspection station, together with the contradictory statements they made to the inspection officer regarding their cargo, provided probable cause supporting the limited intrusion by the law enforcement officers who subsequently arrived, looked in the van's windows, and saw the bundles which strongly suggested to them the presence of contraband (App. 28).

The Court found that Petitioner had the keys and could have driven away thereby affording exigent circumstances (App. 30). Smell was not a factor in its decision.

In ruling, the Florida Supreme Court held the purpose of the statute was investigatory, not regulatory:

> The reason for requiring certain vehicles to stop at the inspection stations is <u>to allow the inspectors a little time</u>

in which to decide if there is probable cause for searching. Once a determination is made, a search should either be made or the driver should be allowed to continue. The fourth amendment prohibits unreasonable seizures as well as unreasonable searches. Detaining a driver and his vehicle for an inordinate amount of time is an unreasonable seizure. If the inspector is unsure of whether sufficient probable cause exists, he may detain the vehicle and seek assistance as was done in this case.

The seizure in this case was not unreasonable. Although close to two hours had passed from the time the vehicle was stopped to the time it was searched, there was no evidence of undue delay. Most of the time was spent in contacting and waiting for a deputy sheriff and an assistant state attorney, men who were more qualified to decide if sufficient probable cause existed. (App. 31) (Emphasis supplied).

REASONS FOR ALLOWING THE WRIT

1. THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND THE UNITED STATES CONSTITUTION IN THAT IT UPHOLDS A SEIZURE AND SEARCH BASED ON THE ARBITRARY AND UNREASONABLE STOPPING OF PETITIONER'S VEHICLE THAT FIT A SUBJECTIVE PROFILE OF VEHICLES THE GOVERNMENT DEEMED LIKELY TO CONTAIN PRODUCTS SUBJECT TO REGULATION BY THE FLORIDA DEPARTMENT OF AGRICULTURE WHEN

THERE WAS NEITHER REASONABLE SUSPICION NOR PROBABLE CAUSE TO BELIEVE THE VEHICLE CONTAINED ANY PROSCRIBED PRODUCTS WHERE THE STATE'S INTEREST IN AGRICULTURAL REGULATIONS DID NOT OUTWEIGH THE RESULTING INTRUSION ON THE PRIVACY AND SECURITY OF THE PERSONS DETAINED.

Stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments "even though the purpose of the stop is limited and the resulting detention quite brief". Delaware v. Prouse, 440 U.S. 648, 653 (1979). The essential purpose of the proscription of the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, in order "to safeguard the privacy and security of individuals against arbitrary invasions." Marshall v. Barlow's, 436 U.S. 307, 312 (1978),

citing Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

> Thus, the permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individuals' Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individuals reasonable expectation of privacy is not "subject to the discretion of the official in the field". Delaware v. Prouse, supra, at 654, quoting Camara v. Municipal Court, supra, 387 U.S. at 532.

The stop of Petitioner's vehicle in the instant case was completely and totally arbitrary. The use of the statute here was not regulatory but investigatory (App. 31). The inspector who stopped the vehicle said that 85% of all vans do not stop at the

station but that the inspectors do not detain every vehicle that does not stop. Instead they arbitrarily decide which vans to stop looking for such factors as panels, curtains, windows, ones that set down low (T-39).

The holding in Delaware v. Prouse, supra, at 661, is applicable here:

> This kind of standardless and unconstrained discretion is the evil the Court has discussed when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. Id.

In Almeida Sanchez v. United States, 413 U.S. 266 (1973) this Court was faced with the exact situation presented by Petitioner herein--a statute authorizing the stopping of vehicles that were within 100 miles of the United States border without any showing of probable cause. The instant case involves a statute authorizing the stopping of all vehicles except cars and recrea-

tional vehicles, again without regard to the existence of probable cause. The purpose of the statute in the Almeida Sanchez case was to stop the flow of illegal aliens. The purpose of the statute here is to stop the flow of illegal agricultural products. Stephenson v. Department of Agriculture and Consumer Services, 329 So. 2d 373 (Fla. 1976). In Almeida-Sanchez, this Court ruled that neither "a stop and search of a moving automobile can be made without a warrant", probable cause or consent. Id., 413 U.S. at 269, going on to state:

> Since neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case, we are left simply with the statute that purports to authorize automobiles to be stopped and searched, without a warrant and within a reasonable distance from any external boundary of the United States. Id., at 272.

This Court went on to delineate the narrow circumstances under which vehicle stops and searches might be permissible:

> But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless 'there is known to a competent official, authorized to search, probable cause for believeing that their vehicles are carrying contraband or illegal merchandise.' Id., at 274.

Here as in Delaware v. Prouse, supra, at 661, the purported state interest in regulation does not outweigh the constitutional infringements resulting therefrom, as this Court held:

> To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches..." Id., quoting Terry v. Ohio, supra, at 22.

These constitutional protections do not disappear simply because a vehicle is subject to state regulations. Cady v. Dombrowski, 413 U.S. 433, 441 (1973). "[I]f the government intrudes...the privacy interest suffers whether the government's motivation is to investigate violation of criminal laws or breaches of other statutory or regulatory standards." Marshall v. Barlow's, Inc., supra, 312, 313. There are certain "relatively unique circumstances" in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise. Id., at 313. See also, United States v. Biswell, 406 U.S. 311 (1972) (federal regulation of firearms); Collande Catering Corp. v. United States, 397 U.S. 72 (1970) (federal regulation of liquor). Otherwise, regulatory inspections unaccompanied by any quantum of

individualized, articulable suspicion must be undertaken pursuant to previously specified "neutral criteria." Marshall v. Barlow's, Inc., id., at 313.

In fact the statute here is not regulatory but an excuse to allow law enforcement officers to investigate suspect vehicles. As the Florida Supreme Court said: "The reason for requiring certain vehicles to stop at the inspection stations is to allow the inspectors a little time, in which to decide if there is probable cause for searching." (App. 31). The agricultural inspector who stopped the vehicle testified his stop was of an "investigatory nature" (T-38-42). He stated he stopped the vehicle because it fit a subjective profile of vehicles likely to contain proscribed products (T-38-40). Thus it was not

stopped simply because it passed the inspection station in violation of the law.

The facts of this case are similar to United States v. Shaefer, 28 Cr.L.R. 2386, where a Pennsylvania statute authorized law enforcement officials to require the driver of any vehicle to stop and submit to weighing in order to see whether it exceeded weight limitations. In striking down the stop and resultant search and seizure under the statute the Court of Appeals for the Third Circuit found that a general roadblock of all trucks had not been set up and held, citing Delaware v. Prouse, supra, Marshall v. Barlow's, supra, and Camara v. Municipal Court, supra, that "...the Courts will not countenance pretextual use of a regulatory statute for an investigatory purpose unrelated to the

statutory scheme." Shaefer, supra, 28 Cr.L. 2387.

This Court has upheld limited profile searches "...supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." Reid v. Georgia, ___U.S.___, 100 S. Ct. 2752, 2753 (1980). But here, as in Reid, supra, the agent's belief that Petitioner was violating agricultural laws was no more than an "inchoate and unparticularized suspicion". Terry v. Ohio, 392 U.S. 1, 27 (1968). Here, as in Reid, the circumstances and actions leading to the stop "...describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could

justify a seizure." Reid, supra, 100 S. Ct. at 2754.

2. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTS WITH LOWER COURTS THAT CONTINUE TO ERODE THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST WARRANTLESS VEHICLE SEARCHES AND SEIZURES IN ABSENCE OF EITHER PROBABLE CAUSE OR EXIGENT CIRCUMSTANCES.

Assuming, without admitting, the constitutionality of the Florida Statutes Section 570.15, the warrantless search of the Petitioner's van nearly two (2) hours after it had been stopped by Agricultural Inspector Perry, and after the van had been escorted to the next exit and then back to the southbound inspection station (a distance of approximately ten miles) (T-37), and held, along with Petitioner, for 60-90 minutes until other officers arrived and decided to search the van without warrant, was nonetheless clearly illegal.

A warrantless search is per se unreasonable,and subject only to a few specifically delineated exceptions. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Katz v. United States, 389 U.S. 347, (1967); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973). These exceptions include: (a) a search incident to arrest; (b) the existence of probable cause coupled with exigent circumstances; and (c) the plain view doctrine. In Coolidge this Court said these exceptions "...are jealously and carefully drawn..." id., at 455.

In Chambers v. Maroney, 399 U.S. 42, (1970), this Court restated the necessity for probable cause in warrantless searches of automobiles, and clearly defined the circumstances under which a warrantless search of an automobile is constitutionally permissible.

Application of the foregoing authorities to the facts of this case make it abundantly clear that there were no exigent circumstances which could conceivably justify a warrantless search of the Petitioner's van.

First, Petitioner and Cain were detained in the Inspection Station, under the control of Inspector Perry and other officers (T-57, 58). The van was located some fifty (50) yards from the station (T-83), after it had been stopped on the open highway and escorted approximately ten miles to the station (T-37). As Inspector Perry testified neither the Petitioner nor the van was going to leave until he, Inspector Perry, had found out what was in the van (T-58).

Second, the record reflects that approximately two (2) hours elapsed between the time Petitioner was detained and the time

of the warrantless search of the vehicle (T 59-61, 66).

Third, the Inspection Station where Petitioner and his vehicle were detained was located twelve (12) miles from the City of Jasper, the County Seat of Hamilton County, Florida. Even assuming arguendo the existence of probable cause, any one of several persons (i.e., Inspector Perry, Nobles, Deputy Copeland, Investigator Tompkins, or, especially, Assistant State's Attorney Dekle) had ample opportunity to travel to Jasper (or stop on the way to the scene) to make application for a search warrant. Inspector Perry testified that a Judge was available in Hamilton County for obtaining a search warrant, and that other judges lived in Suwannee County, about eighteen (18) miles away, and in Lake City, about twenty (20) miles away (T-67, 68). Coinci-

dentally, Lake City is the same town which Assistant State Attorney Dekle left to come to the station to assist in the warrantless search (T-70).

Finally, regardless of how the Court resolves the serious inconsistencies between the various versions of seeing or not seeing burlap colored containers (T-15, 34, 71, 73), and smelling or not smelling the odor of marijuana (T-5, 18, 64), it is undeniable from the testimony adduced that the officer who originally seized Petitioner and his vehicle, Inspector Perry, held both on the basis of the fact that (1) the van failed to stop at the inspection station and (2) it "was kind of heavy" (T-27). That officer saw no suspicious packages (T-34) and smelled no odor of marijuana (T-64). Yet the van was held not for the purpose of obtaining a search warrant

which is specifically mandated by the Section 570.15(2), Florida Statutes, but for the arrival of more experienced officers. Assistant State's Attorney Dekle, who made the decision to search made it solely on the fact that he saw burlap bags when he looked through the van's window (T-71-73).

Clearly, the warrantless search failed to meet the requirements clearly set forth by this Court in Coolidge, supra, and Chambers, supra. The decision in Petitioner's case is an important and radical departure from this Court's long line of decisions in this area, and is already being applied by the appellate Courts of Florida to uphold similar searches. See, e.g., Gordon Corbett Brock v. State of Florida, Supreme Court of Florida Case No. 57,718 (March 5, 1981).

3. THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND WELL FOUNDED PRINCIPLES OF APPELLATE REVIEW IN THAT THE EVIDENCE FAILS TO SUPPORT THE OPINION OF THE FLORIDA SUPREME COURT.

The decision of the Florida Supreme Court upholding the search rests on factual assumptions by the court unsupported by the record. This factual assumption is critical to a correct application of Fourth Amendment principles. In its opinion the Florida Supreme Court stated:

> The facts in this case are even more compelling; Gluesenkamp, who owned the van, was not the one who was arrested for failing to stop at the inspection station...Since he had the keys, he could have attempted to drive away at any time (App. 30).

But while Petitioner did, indeed, have the keys initially, they were surrendered to the deputy sheriff after being ordered to do so when taken to the inspection station

(T-7, 73, 87). More importantly, Inspector Perry testified Petitioner could not have moved the van, saying "That van couldn't go no place...(b)ecause I had to find out what was in it before I even let it go."(T-58).

The Florida Supreme Court also made a factual determination that an Assistant State Attorney was qualified to make a probable cause determination and that the detention of the van and the Petitioner until he could come on the scene to assess probable cause was legal (App. 31). Such a holding is contrary to the clear holding of Coolidge v. New Hampshire, 403 U.S. 443 (1977) where the Supreme Court held that a state's attorney or law enforcement officials are not qualified to make a probable cause determination: "[P]rosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard

to their own investigations - the 'competitive enterprises' that must rightly engage their single-minded attention." Id., at 450. Even a judicial officer, when he is too close to the events, has been held not to fulfill the role that the Constitution reserves for a neutral and detached magistrate to review probable cause before any intrusion into a protected space. See, Lo-Ji Sales, Inc. v. New York, 447 U.S.319, 327 (1979).

In Petitioner's case the record clearly demonstrates that the officer who originally detained Petitioner's vehicle for failure to stop at the inspection station clearly did not have probable cause to search at the roadside. Both Carroll, supra, and Chambers, supra, at 399 rely heavily on the concept of a car stopped "on the highway" which is "movable" where "the

opportunity to search is fleeting..." Id. Clearly, Petitioner's case does not present an immediate, roadside search by an officer who clearly possessed probable cause. Regardless of any consideration as to probable cause, the law absolutely requires a search warrant as to an immobilized vehicle, removed from the roadway and under the exclusive control of law enforcement authorities. The Supreme Court has clearly held in United States v. Chadwick, 433 U.S. 1 (1979) that where an object comes under police control, exigency ceases to exist, and the officers must get a search warrant. A warrantless search--regardless of how strong the probable cause, see Chadwick, supra--is illegal. In reaffirming Chadwick's holding, the Supreme Court recently emphasized in Arkansas v. Sanders, 442 U.S. 753, (1979):

> But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search--after the police have seized the object to be searched and have it securely within their control. Id., at 763.

This Court's decision in United States v. United States Gypsum Co., 333 U.S. 364 (1948) long ago established the ground rules for appellate review of fact findings: findings of fact will not be set aside unless "clearly erroneous." "A finding is 'clearly erroneous' where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. at 395. It follows that a "clearly erroneous" ruling is demanded where there is a total absence of evidence. See Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978).

Similarly, this Court stated in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) that "[i]t is not our place, however, to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts." Id. at 758. (Emphasis added).

The Court below violated well-founded principles of appelate review by failing to base its opinion on the record in the case as to critical facts related to the search and this Court should issue its writ to reaffirm these principles.

4. THE DECISION BELOW UPHOLDING THE CONSTITUTIONAL VALIDITY OF THE STATE STATUTE WHICH ALLOWS ARBITRARY STOPS BY GOVERNMENT OFFICIALS WITHOUT ARTICULABLE SUSPICION OR PROBABLE CAUSE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE FOURTEENTH AMENDMENT, AND CONTRARY TO THE UNITED STATES CONSTITUTION.

Under the Florida Statute § 570.15, as interpreted by the Supreme Court of the State of Florida, vehicles bearing "RV" license plates were exempt from inspection, while vehicles in precisely the same circumstances which do not display "RV" license plates were subject to inspection. The equal protection clause of the Fourteenth Amendment to the United States Constitution has long been held to prohibit unequal treatment of persons similarly situated. In Davis v. Weir, 497 F.2d 139 (5th Cir. 1974) the Court of Appeals quotes Reed v. Reed, 404 U.S. 71, 75 (1971), noting that this Court has consistently and repeatedly explained that:

> ...The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrealted to the objective of that statute. A

> classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Id., at 144.

Under traditional equal protection analysis, a legislative classification is permissible if it is rationally related to a legitimate state interest, United States Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

Thus, this Court has long held that a law creating distinct classifications without a fair and substantial rational relation to the purposes of the legislation results in a denial of constitutionally guaranteed equal protection of the laws. See Royster Guano Co. v. Virginia, 253 U.S. 412 (1920):

> But the classification must be reasonable, not arbitrary, and not rest upon some ground of difference having a

> fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike. Id., at 415.

The purpose of § 570.15(1) was construed in Stephenson v. Department of Agriculture and Consumer Services, 329 So.2d 373, (Fla. 1st D.C.A. 1976), wherein that court noted:

> Appellee has full authority under the police power of the State of Florida to conduct agricultural inspections of the vehicles mentioned in the above statutes provided such inspections are made pursuant to the terms of said statutes. The inspections are necessary in order that Appellee may carry out its responsibilities relating to disease control, fruit and vegetable grading and other similar matters required by law, Appellee's regulations and Federal marketing orders. Id., at 376. (Emphasis added).

The effect of the statute was to create a legal distinction in the absence of a significant and meaningful factual difference between those motor vehicles having

"RV" tags and those which do not bear such tags. Assuming that the legislature had a legitimate purpose for regulating the transportation of agricultural products within the State, it has exceeded the permissible limits of the equal protection clause of the Constitution of the United States by classifying those vehicles which are subject to inspection solely upon the basis of whether or not the vehicle bears an "RV" license tag.

The differing treatment of "RV" and non-"RV" licensed vehicles bears no legitimate relationship, rational or otherwise, to the health purposes of the inspection statute. Excluding vehicles registered as recreational vehicles from possible inspection by state officials looking for illicit fruits while subjecting others situated in precisely the same circumstances except for

the license plate on the vehicle, results in a constitutionally deficient disparity of treatment.

The totally unreasonable distinction between motor vehicles with "RV" tags and those without such tags is further revealed in Section 320.06(1)(a), (A) Florida Statutes, which provides in material part:

> Registration license plates and certificates of registration shall be issued to, and remain in the name of, the owner of each vehicle registered and may be transferred by the owner from the vehicle for which the registration license plate was issued to any vehicle which the owner may acquire within the same classification...

Thus, the owner of a fully-equipped truck camper bearing an "RV" license tag can sell his vehicle, purchase a Ford F-150 pick-up truck within the same weight class, and lawfully transfer his "RV" license tag to the truck. Thereafter, he can transport agricultural produce or other cargo, all

without being subjected to an inspection by Florida Department of Agricultural employees--simply because the pick-up truck has an "RV" license tag.

It should be noted that § 570.15(1) and § 570.15(2) were not entirely consistent. Subsection (1) granted access to, among other things, "motor vehicles, other than vehicles bearing an "RV" license tag". Subsection (2) makes it a misdeameanor for any truck to pass an official road guard inspection station without first stopping for inspection.

Due to the transferable nature of motor vehicle license tags in Florida, the owner of an "RV" license tag may affix the same tag to his truck. If that vehicle passed an inspection station without stopping the truck for inspection, he has committed a misdemeanor [i.e., violation of Florida

Statutes § 570.15(2)]; even though Section 570.15(1) expressly exempted the truck from inspection solely because it bore an "RV" license tag.

The question presented herein is whether a state under the guise of it police power may enact such legislation as will seriously burden, hinder and impede the commerce and trade agreement between the states. The statute imposes a duty on every driver, if not occupant, passing along Florida Highways to determine for himself whether it falls within the proscription of the statute in order to escape criminal liability. This the driver must do even though he has no notice nor does the statute define the types of trucks or vans that might fit the proscription.

The right of a citizen to travel from state to state uninhibited by statutes

which burden or unreasonably restrict such movement is a fundamental right. Shapiro v. Thompson, 394 U.S. 618, 630 (1969). The right to associate freely and "to go where one pleases" are also fundmental rights protected by the First and Fourteenth Amendments. Alladin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1041 (5th Cir. 1980). Because of these fundamental rights, strict scrutiny is called for and the state must demonstrate a compelling interest to justify the classification. Mason v. Lister, 562 F.2d 343, 346 (5th Cir. 1978); Dorough v. Estelle, 457 F.2d 1007, 1010 (5th Cir. 1974).

This statutory classification fails to satisfy even the 'rational basis' test; however, the constitutional infirmity of the statute is even clearer when the stricter test is applied. Not only is

there no substantial or rational basis for the classification, but even if some rational basis were to be arguably present, the requisite "compelling state interest" could not be found.

The vehicle in the instant case was a van without an "RV" license tag. The vehicle was registered and properly licensed in the State of Indiana (T-79). Thus, the statute's classification offends the Constitution, as the effect of the application fo the statute to Petitioner was to subject him to inspection on the basis of his vehicle license not being from Florida, or to punish an interstate traveler for not re-licensing his vehicle in the visited state.

The citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states, and of

the United States. Article IV, Section 2, Fourteenth Amendment. As discussed infra, freedom to move from state to state is a fundamental liberty. Edwards v. California, 314 U.S. 160 (1941). In Ward v. Maryland, 12 Wall 418, 430 (1870), the Court concluded that the commerce clause "... plainly and unmistakeably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation."

The lack of a precise definition of recreational vehicles in the statute leaves the stopping of vans within the unbridled discretion of the law enforcement officers. Decisions on who to stop cannot be left in the unfettered discretion of law enforcement officials "because it encourages

arbitrary and erratic arrests and convictions." Papa- christou v. City of Jacksonville, 405 U.S. 156, 162 (1972). This practice of leaving who to stop in the hands of law enforcement officials was condemned in Delaware v. Prouse, 440 U.S. 648 (1979):

> This kind of standardless and unconstrained discretion is the evil the Court has ddiscussed when in previous cases it has insisted that the discretion of the officials in the field be circumscribed at least to some extent. Id., at 661.

In a vehicle of the type Petitioner was driving due to the fact it was licensed by another state, how could the state tell whether it was a recreational vehicle or cargo van unless the unwarranted intrusion and stop was followed by an unwarranted look inside the van?

The definition of a crime is the exclusive function of the legislature and the exercise of such unfettered and unqualified

discretion in construing statutes cannot be left in the hands of law enforcement officers or jurors. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

> It is well established that a law fails to meet the requirements of Due Process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without legally fixed standards, what is prohibited and what is not in each particular case." Id.

The constitutional deficiency of the statutes here is similar to the statutes struck down by the Court in Cox v. Louisiana, 379 U.S. 536, 579 (1965):

> Such a statute does not provide for government by clearly defined laws, but rather for government by the moment to moment opinions of a policeman on his beat.

Imperative to the proper construction of the statute here is the Supreme Court's holding in Cramp v. Board of Education, 368 U.S. 278, 287 (1961): "...the vice of unconstitutional vagueness is further aggra-

vated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the constitution."

The statute here "...fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden the statute." United States v. Harris, 347 U.S. 612, 617 (1954). All persons "are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938). As argued infra, a driver of a van does not know he falls within the proscription of the statute nor is he given notice that he must stop at the inspection station.*

*Florida Statutes § 570.15 has been amended since Petitioner's conviction, and subsection 7 now reads: "Motor vehicles, except private passenger automobiles with no trailer in tow, travel trailers, camping trailers, and motor homes as defined in § 320.06(1)(b).

Lanzetta is but one of a long established line of cases insisting that the law give fair notice of the offending conduct. See Cline v. Frink Davis Co., 274 U.S. 445 (1928); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1920).

The statute here is to be judged by the principles set out in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Here, as in Papchristou, the statute proscribes activities which by prevalent standards is normally innocent. There, night walking was proscribed. Here, driving a cargo van without an "RV" tag past an inspection station is proscribed. Just as "walkers and strollers and wanderers may be going to or coming from a burglary" id., 405 U.S. at 844, occupants of vans might be carrying illegal fruit or other contraband, but as the Court said in United States v. Reese, 92 U.S. 214 (1871):

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." Id., at 221.

"[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." United States v. National Dairy Products, 372 U.S. 29, 32 (1963).

While the sign at the interstate said "all trucks" must stop, the state concedes passenger trucks and recreational vehicles are not trucks within the meaning of the Florida statute. "Words which are vague and fluid...may be as much of a trap for the innocent as the ancient laws of Caligula." United States v. Cardiff, 344 U.S. 174, 176 (1953). Florida authorities stated that they have the most trouble with getting vans to stop at inspection stations (T-71-73). Numerous Supreme Court

decisions have struck down both criminal and regulatory schemes upon a finding that "men of common intelligence must necessarily guess at is meaning and differ as to its application." Connally v. General Construction Company, 269 U.S. 385, 391, (1926). See also, United States v. Mersky, 361 U.S. 431, (1960); M. Kraus and Brothers v. United States, 327 U.S. 614, (1946).

CONCLUSION

For the foregoing reasons, Petitioner respectfully reuests that this Court issue a writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Petition for Writ of Certiorari to the Florida Supreme Court upon the Florida State's Attorney, Jim Smith, The Capitol, Tallahassee, Florida.

This 16th day of March, 1981.

JAMES K. JENKINS

80-1578

No.

Office-Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL W. GLUESENKAMP,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

	Page
Appendix A Opinion of the Florida Supreme Court Affirming Petitioner's Conviction, Decided October 16, 1980.	1a
Appendix B Decision of the Florida Supreme Court Denying Petitioner's Motion for Rehearing, Issued January 14, 1981.	38a
Appendix C Decision of the Florida Supreme Court Denying Petitioner's Petition for Stay of Mandate, Issued January 27, 1981.	40a
Appendix D Decision of the Hamilton County, Florida Circuit Court Overruling Petitioner's Attack On the Constitutionality of Florida Statute 570.15 (1977) (supp. 1978).	41a
Appendix E Judgment and Sentence of Petitioner Entered October 12, 1978.	43a
Appendix F Constitutional and Statutory Provisions Involved	46a

APPENDIX A

SUPREME COURT OF FLORIDA

Case Nos. 57,124, 56,928 & 57,131

DANIEL W. GLUESENKAMP, Appellant,

vs.

STATE OF FLORIDA, Appellee.

HUBERT DWIGHT MASSENGALE, et al., Appellants,

vs.

STATE OF FLORIDA, Appellee.

JOSEPH FRANCIS MOUW, et al., Appellants,

vs.

STATE OF FLORIDA, Appellee.

[October 16, 1980]

BOYD, J.

These consolidated cases are before the Court on appeal from judgments rendered by

the Circuit Court of the Third Judicial Circuit, in and for Hamilton County. In rendering the judgments the circuit court passed upon the consitutionality of section 570.15, Florida Statutes (1977) and (Supp. 1978). Therefore, we have jurisdiction of the appeals. Art. V, § 3(b) (1), Fla. Const.

In case no. 57,124, Dan W. Gluesenkamp was charged in a two-count information with possession of cannabis in excess of one hundred pounds with intent to sell and possession of cannabis in excess of five grams, both being offenses prohibited by section 893.13, Florida Statutes (1977). After pleading not guilty, the appellant moved to dismiss the information and to suppress evidence. Thereby he challenged both the constitutionality of section 570.15, Florida Statutes (1977), and the legality of the search performed after a

highway stop executed pursuant to that statute. After the court denied his motions to dismiss and to suppress evidence, the appellant changed his plea to nolo contendere, specifically reserving the right to appeal these two rulings. The court then adjudicated him guilty and imposed sentence.

In case no. 56,928, Hubert Dwight Massengale and Mason Gregory Kring were jointly charged in a two-count information with possession of cannabis in excess of one hundred pounds with intent to sell and possession of cannabis in excess of five grams. After pleading not guilty, the appellants moved to suppress evidence. In their motion they challenged the constitutionality of section 570.15, Florida Statutes (Supp. 1978) and questioned the legality of a search performed after they were stopped on the highway pursuant to

that section. The court denied the motion and the appellants entered a plea of nolo contendere, specifically reserving the right to appeal the court's ruling on the motion. The court adjudicated the appellants guilty on both counts and sentenced them.

In case no 57,131, Joseph Franics Mouw and Paul Marion Hartwig were jointly charged in a two-count information with possession of cannabis in excess of one hundred pounds with intent to sell and possession of cannabis in excess of five grams. After pleading not guilty the appellants moved to suppress evidence. The motion challenged the constitutionality of section 570.15, Florida Statutes (Supp. 1978) and questioned the legality of a search performed after they were stopped on the highway pursuant to that section. The court denied the motion and the appellants

entered a plea of nolo contendere, specifically reserving the right to appeal the court's ruling on the motion. The court then adjudicated the appellants guilty on both counts and sentenced them.

In case no. 57,124, appellant Gluesenkamp and Debra Cain were traveling in the appellant's van on January 15, 1978. With Ms. Cain at the wheel, they passed an agricultural inspection station without stopping. A Department of Agriculture inspection officer gave chase and pulled the van over. Cain got out of the vehicle to talk to the officer while the appellant drew together the curtain that separated the front seat from the cargo area of the van. Cain told the inspector they were hauling plants. The inspector asked to see the documents pertaining to the cargo of plants. Cain then went to the van, talked to the appellant, and returned to say that

that they were hauling potting soil. The inspection officer asked to look in the van and the appellant refused. The inspector then required Gluesenkamp and Cain to return in the van to the inspection station.

At the inspection station the appellant again refused to allow the inspector to look inside the van. The inspector arrested Cain for passing the station without first stopping for inspection, a misdemeanor proscribed by section 570.15(2), Florida Statutes (1977). The inspector contacted his supervisor and an hour later a deputy sheriff, an assistant state attorney, and an investigator arrived at the inspection station. They looked through the van's windows and saw some burlap-colored bundles which they believed contained cannabis. They appellant surrendered a key to them after they told him they had probable cause for a search, did not need a warrant,

and would break the van open if he refused. They found what they believed to be cannabis and the deputy arrested Gluesenkamp and Cain.

In case No. 56,928, appellants Massengale and Kring were traveling in a van on the night of July 20, 1978, and they proceeded past an agricultural inspection station. An inspection officer went after and stopped them, and asked them to return to the station. The inspector arrested Massengale for failing to stop for inspection in violation of section 570.15(2), Florida Statutes (Supp. 1978), and asked if he could look inside. Kring, the owner of the van, opened the door. The inspector saw several large bundles wrapped in burlap and plastic and smelled cannabis. He summoned a deputy sheriff who confirmed that the bundles contained cannabis and arrested the appellants.

In case no. 57,131, appellants Mouw and Hartwig, on June 18, 1978, passed an agricultural inspection station without stopping, were apprehended, and accompanied an inspection officer back to the station. There appellant Mouw opened the van. The inspector observed a large compartment built into the bed of the vehicle. He saw cannabis seeds on the floor and smelled cannabis. He arrested the appellants for violation of section 570.15, Florida Statutes (Supp. 1978). Then the vehicle was searched pursuant to warrant and over three hundred pounds of cannabis were found in the compartment.

All of the appellants in these consolidated cases challenge the constitutionality of section 570.15, requiring all trucks to stop at agricultural inspection stations, and question the statute's applicability to them on the ground that their vans are not trucks within the meaning of the statute.

Each appellant argues that if the initial apprehensions pursuant to the statute were thus unlawful, the evidence subsequently seized is the fruit of such illegality and the convictions cannot stand.

Section 570.15, Florida Statutes (1977), provides:

> 570.15 Access to places of business and vehicles.--
> (1)(a) The commissioner, assistant commissioner, directors, counsel, experts, chemists, agents, inspectors, road-guard inspection special officers, and other employees and officers of the department shall have full access at all reasonable hours to all:
> 1. Places of business;
> 2. Factories;
> 3. Farm buildings;
> 4. Carriages;
> 5. Railroad cars;
> 6. Trucks;
> 7. Motor vehicles, other than private passenger automobiles with no trailer in tow or any vehicle bearing an RV license tag;
> 8. Truck and motor vehicle trailers;
> 9. Vessels; and
> 10. All records pertaining thereto; used in the production, manufacture, storage, sale, or transportation within

the state of any food product; any agricultural, horticultural, or livestock product; or any article or product with respect to which any authority is conferred by law on the department.

(b) If such access be refused by the owner, agent, or manager of such premises or by the driver of such aforesaid vehicle, the inspector or road-guard inspection special officer may apply for a search warrant which shall be obtained as provided by law for the obtaining of search warrants in other cases, or may conduct a search of any of the aforesaid vehicles without a warrant pursuant to s.933.19.

(c) Such departmental officers, employees, and road-guard inspection special officers may examine and open any package or container of any kind containing or believed to contain any article or product which may be transported, manufactured, sold, or exposed for sale in violation of the provisions of this chapter, the rules of the department, or the laws which the department enforces and may inspect the contents thereof and take therefrom samples for analysis.

(2) It shall be unlawful for any truck or any truck or motor vehicle trailer to pass any official road-guard inspection station without first stopping for inspection. A violation of this subsection shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Subsection (1) of the statute pertains to "access" in the context of the inspection functions of the Department of Agriculture. All of the enumerated places and conveyances to which "access" is provided for by subsection (1)(a), are qualified by the clause, "used in the production, manufacture, storage, sales, or transportation within the state of any food product; or any article or product with respect to which any authority is conferred by law on the department." If a vehicle or place does not come within the meaning of this qualifying clause, then the departmental officials have no right of "access."

Subsection (2) of the statute forbids "any truck or any truck or motor vehicle trailer to pass any official road-guard inspection station without first stopping for inspection." In Stephenson v. Department of Agriculture and Consumer Services, 342 So.2d 60 (Fla. 1976), we held that the

requirement that all trucks stop at inspection stations is a valid exercise of the police power. The appellant argued there that to require his trucks to stop was irrational, since they never carried agricultural products. Thus we have held in effect that the state may require vehicles to stop even though the department may have no right of access to them under the statute. Trucks, truck trailers, and motor vehicle trailers are required to stop in order for the department officials to determine whether they have a right of access, and, if so, whether to exercise it.

The appellants argue that their vans are not trucks within the meaning of section 570.15(2), Florida Statutes (Supp. 1978). "Truck" is not defined in section 570.15 or anywhere in chapter 570. But the Florida Uniform Traffic Control Law defines it as "Any motor vehicle designed, used, or maintained primarily for the transportation of

property." § 316.003, Fla. Stat. (1979); ch. 71-135, § 1, Laws of Fla. Chapter 320 of Florida Statutes, (1977), pertaining to drivers' licenses, defines "truck" as including "any motor vehicle designed or used principally for carrying things other than passengers and includes a motor vehicle to which has ben added a cabinet box, platform, rack, or other equipment for the purpose of carrying merchandise other than the person or effects of the passengers." § 320.01(13), Fla. Stat. (1977). Section 323.01(12), Florida Statutes (1977), in the chapter pertaining to the regulation of motor carriers, provides: "'Truck' includes any self-propelled motor vehicle designed and used principally for carrying things other than passengers."

Some vans are designed or maintained so as to have a cargo area to the rear of the front seats. Such vans, since they are designed specifically for transporting things

rather than passengers, fall within the statutory definition of a truck. Other vans however, do not have such a cargo area. Instead they are designed and maintained with several rows of seats for the sole purpose of carrying passengers, with the remaining space being designed to carry luggage or other personal effects of the passengers. Such vans are frequently used for bus, sightseeing, and shuttle service. And, of course, many of them are in use as ordinary, private, personal or family passenger vehicles. It is the design, maintenance, and actual use of a van-type vehicle that determine whether it is a truck. Vans designed to carry cargo are trucks and are required to stop at agricultural inspection stations. Vans designed as passenger vehicles are not. § 570.15 Fla. Stat. (Supp. 1978); Eden v. State, 370 So.2d 826 (Fla. 1st DCA 1979). This distinction

between cargo vehicles and passenger vehicles is also supported by an analysis of subsection (1) (a) of the statute. In listing the places and vehicles to which department officials are granted access, the statute draws a distiniction between passenger automobiles and other motor vehicles. The seventh enumerated clause of subsection (1)(a) provides for inspection access to:

> Motor vehicles, other than private passenger automobiles with no trailer in tow or any vehicle bearing an RV license tag;

§ 570.15(1)(a)7., Fla. Stat. (1977).[1] We conclude that in each of these cases, the

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[1]Chapter 75-180, Laws of Florida, amended the seventh enumerated cluase of section 570.15(1)(a), effective June 8, 1978, to read:

> Motor vehicles, except private passenger automobiles with no trailer in tow, travel trailers, camping trailers, and motor homes as defnied in s. 320.01(1)(b);

§ 570.15(1)(a)7., Fla. Stat. (Supp. 1978).

appellants' vans came within the meaning of the word "truck" as used in section 570.15(2) because they were not being used as passenger vehicles as contemplated by the statute. Therefore, they were required to stop.

The appellants also present the closely related argument that section 570.15(2), Florida Statues (Supp. 1978), denies them due process of law under the Florida and United States Constitutions because it is vague. They argue that since it is a penal statute, its vagueness renders it invalid on its face. Since the law is void, the appellants contend, their pursuit and apprehension for violation thereof were unlawful, and the evidence obtained in the course of the events which followed should have been suppressed.

A penal statute must be written in language sufficiently definite, when measured by common understanding and practice, to

apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation. State v. Ashcraft, 378 So.2d 284 (Fla. 1979); Brock v. Hardie, 114 Fla. 670, 154 So. 690 (1934).

As we stated above, section 570.15(1)(a), in providing the conditions for agricultural inspection access, demonstrates a legislative purpose to distinguish between vehicles carrying goods and vehicles carrying passengers. Furthermore, the above-quoted statutory definitions of "truck" in chapters 316, 320, and 323, Florida Statutes (1977), provide authoritative definitions and indicate what is the generally accepted definition of the word "truck".

We conclude that the offense defined in section 570.15(2) is not vaguely expressed by virtue of any indefiniteness of the term "truck". Furthermore, ordinary persons of

common intelligence can conclude from the statute that van-type vehicles that are designed, maintained, or used for the purpose of transporting goods rather than passengers are included in the meaning of the word "truck" as used in section 570.15(2).

Appellant Gluesenkamp argues that section 570.15, Florida Statutes (1977), violates principles of equal protection and equality of treatment under the United States and Florida Constitutions. He contends that the statute establishes a classification among motor vehicles using the highways and that some are required to stop at agricultural inspection stations while others are not. Subsection (2), as we have seen, creates a distinction between trucks, truck trailers, and motor vehicle trailers on the one hand and passenger vehicles on the other. The appellant also points out that at the time of his arrest, section 570.15(1)(a)7. provided for inspection

access to "[m]otor vehicles, other than private passenger automobiles with no trailer in tow or any vehicle bearing an RV license tag; . . . ." Motor vehicles exempted from the requirement of stopping for inspection, the appellant argues, are just as capable of carrying agricultural products within the regulatory jurisdiction of the department as are those vehicles that are reuired to stop. He argues that it is improper to exclude from the inspection requirement vehicles with license tags bearing the recreational vehicle designation, and points to evidence that it is a simple matter to obtain such a tag and to display it on a vehicle used for transporting goods.

As was discussed previously, section 570.15(1)(a) provides for "access" by various department officials to all of the enumerated places and conveyances that are "used" in any phase of the agriculture

industry. The seventh enumerated clause, therefore, provides for access to all "motor vehicles" used in agriculture. Clause 7. also exempts some of these: "private passenger automobiles with no trailer in tow [and] any vehicles bearing an RV license tag." Private passenger automobiles with no trailer in tow and vehicles bearing "RV" license tags are therefore not among the conveyances to which the department is provided access, even when they are actually being used in some phase of the agriculture industry.

In deciding the merits of the appellant's equal protection challenge, the first step is to determine what kind of standard to apply. It might be suggested that the differential treatment provided for by the statute impinges upon the fundamental "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures. . . ." U.S. Const.. amend. IV; art. I, § 12, Fla. Const. We think, however, that the required stop for inspection is not an unreasonable seizure. Stephenson v. Department of Agriculture and Consumer Services, 342 So.2d 60 (Fla. 1976). And after a vehicle has stopped for inspection, a search may be conducted only under certain circumstances. Section 570.15(1)(b), Florida Statutes (1977), provides:

> If such access be refused by the . . . driver of such aforesaid vehicle, the inspector or road-guard inspection special officer may apply for a search warrant which shall be obtained as provided by law for the obtaiing of search warrants in other cases, or may conduct a search of any of the aforesaid vehicles without a warrant pursuant to s. 933.19.

The fourth amendment rights of users of the highways are protected under the statute. Compare Bagocus v. State, 359 So.2d 885 (Fla. 1st DCA 1978), with Powell v. State, 332 So.2d 105 (Fla. 1st DCA 1976).

Section 570.15 is a regulation of transportation and the use of the highways of the state. It is a valid exercise of the police power in furtherance of the public health and public economic good. Stephenson v. Department of Agriculture and Consumer Services, 342 So.2d 60 (Fla. 1976). It does not impinge upon any fundamental rights.

The test to be applied in determining whether distinctions drawn by statutes such as this one are valid has been stated in innumerable cases, and was recently stated by the United States Court of Appeals for the Fifth Circuit: "In the absence of any suspect classification, invasion of fundamental interests, or invidious intent, all that the United States Constitution demands is that the classifications be rationally related to a legitimate state interest." Jackson v. Marine Exploration Co., 583 F.2d 1336, 1346 (5th Cir. 1978). Under the

Florida Constitution, the same principle applies. Ordinarily, the test is the "rational basis" test. See Landrau v. State, 365 So.2d 695 (Fla. 1978).

Acts of the legislature are presumed valid, and the burden is on the challenger to show that a legislative classification violates principles of equality. A legislative classification will be upheld where the distinction drawn rests on some real and practical basis in relation to the purpose of the legislation. See, e.g., Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); Hunter v. Flowers, 43 So.2d 435 (Fla. 1949); State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367 (1915). If a legislative classification has such a reasonable basis, it does not violate equal protection simply because it is not drawn with perfect precision or because in its application some inequality results. Dandridge v. Williams, 397 U.S. 474 (1970); Lewis v. Mathis, 345

So.2d 1066 (Fla. 1977). A regulation of economic matters embodying a classification based on practical convenience need not apply with mathematical uniformity if it has such a rational basis. See, e.g., Sproles v. Binford, 286 U.S. 374 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

Applying the conventional standard, we hold that the distinction drawn by section 570.15 between vehicles designed, maintained, or used for the carriage of property on the one hand and passenger vehicles on the other is reasonably related to the Department of Agriculture's inspection functions and does not violate the equal protection clause of the United States Constitution or the equality guaranty of the Florida Constitution.

As has been recited above, the searches in cases no. 56,928 and no. 57,131, following pursuit and apprehension for violation

of section 570.15(2), were based on consent or a warrant. No issue of the voluntariness of the consent or of the existence of probable cause in either of those cases is before us. Appellant Gluesenkamp, on the other hand, did not consent to the search of his van, and properly preserved for appeal the question of the legality of the search.

Since the agricultural inspector and law enforcement officer were refused access to Gluesenkamp's van and a search warrant was not obtained prior to conducting the search, the issue in this case is whether the search was properly conducted without a warrant pursuant to section 933.19, Florida Statutes (1977). § 570.15(1)(b), Florida Statutes (1977). Section 933.19 expressly adopts the holding of Carroll v. United States, 267 U.S. 132 (1925, as the law of this State. In Carroll the defendants were convicted of transporting liquor in

violation of the National Prohibition Act. The defendants and a companion had met with undercover federal prohibition agents in Grand Rapids. The agents said they were interested in buying some whiskey. The defendants said they would go get it and would be back shortly. They did not return, but their companion did and he explained that they would bring the whiskey the next day, which they never did. Three months later the federal agents saw the defendants in the same car they had the night the agents were supposed to buy whiskey from them. The agents pulled the defendants over and searched their car and found contraband liquor.

The defendants appealed their conviction, claiming their fourth amendment rights to be free from unreasonable search and seizure had been violated. The United States Supreme Court affirmed, holding that automobiles may be searched without a

warrant when "there is known to a competent official, authorized to search, probable cause for believing that [the] vehicles are carrying contraband or illegal merchandise." Id. at 154. Because the agents had stopped the defendants on a highway connecting Grand Rapids and Detroit, a port of entry for illegal liquor, the Court held the agents had probable cause to suspect the defendants were transporting liquor. The Court emphasized that a different standard for searching an automobile than a house was justified because of the automobile's mobility.

While appellant Gluesenkamp does not question that the law enforcement officials had probable cause to enter and search his van, he suggests in his brief that the officials' actions in looking into his van from the outside constituted a search and that this preliminary search was not supported by probable cause. We believe,

however, that the conduct of Cain and Gluesenkamp in illegally proceeding past the inspection station, together with the contradictory statements they made to the inspection officer regarding their cargo, provided probable cause supporting the limited intrusion by the law enforcement officers who subsequently arrived, looked in the van's windows, and saw the bundles which strongly suggested to them the presence of contraband.

Gluesenkamp contends that there were no exigent circumstances justifying a warrantless search since he and his companion had been detained and were not in a position to drive the van out of the jurisdiction. In short the argument is that Carroll does not apply where the automobile is no longer mobile.

This same argument was refuted by the United States Supreme Court in Chambers v. Maroney, 399 U.S. 42 (1970), where the

police, upon probable cause but without a warrant, searched the defendant's car parked outside the police station sometime after the defendant had been arrested. In holding that the police were not required to obtain a warrant, the Court stated:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained

> at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. . . .

Id. at 51-52 (footnote omitted). See also Texas v. White, 423 U.S. 67 (1975); Flynn v. State, 374 So.2d 1041 (Fla. 1st DCA 1979).

The facts in this case are even more compelling. Glueserkamp, who owned the van, was not the one who was arrested for failing to stop at the inspection station since he was not the one driving at the time. Since he had the keys, he could have attempted to drive away at any time. There is no question that if he had, the police would have had the authority to stop him and search the van without a warrant. We

see no reason why the police should be required to wait until an attempt is made to move a vehicle before they are allowed to search it.

The reason for requiring certain vehicles to stop at the inspection stations is to allow the inspectors a little time in which to decide if there is probable cause for searching. Once a determination is made, a search should either be made or the driver should be allowed to continue. The fourth amendment prohibits unreasonable seizures. Cf., Seuss v. State, 370 So.2d 1203 (Fla. 1st DCA 1979); Miller v. State, 368 So.2d 943 (Fla. 1st DCA 1979). If the inspector is unsure of whether sufficient probable cause exists, he may detain the vehicle and seek assistance as was done in this case.

The seizure in this case was not unreasonable. Although close to two hours had passed from the time the vehicle was

stopped to the time it was searched, there was no evidence of undue delay. Most of the time was spent in contacting and waiting for a deputy sheriff and an assistant state attorney, men who were more qualified to decide if sufficient probable cause existed. They conducted the search soon after they determined probable cause existed. Since neither the search nor the seizure were unreasonable, Gluesenkamp's fourth amendment rights were not violated.

The judgments of conviction are affirmed.

It is so ordered.

SUNDBERG, C. J., ADKINS, OVERTON, ENGLAND and McDONALD, JJ., Concur ALDERMAN, J., Concurs specially with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ALDERMAN, J., concurring specially.

Although I concur with the majority opinion construing and upholding the constitutionality of section 570.15, Florida Statutes (1977), and defining trucks to include a certain type of van, I note that an inspector will not be able generally to discern from the outside appearance of a van passing on the highway whether it falls within the definition of truck and, consequently, is required to stop for inspection, or whether the van is excluded from the provisions of section 570.15 because it is a noncargo, passenger carrying van. Therefore, when a van passes an inspection station without stopping, the inspector has a right to pursue and to stop the van and to determine by looking inside

whether it is a passenger van or a cargo van. If it is determined that the van is a cargo van, the inspector can request that it be opened for inspection. If, while looking into the van, the inspector sees contraband in plain view, he then has probable cause to seize the contraband even if the van is a passenger van and not a truck as defined by section 570.15.

An Appeal from the Circuit Court in and for

Hamilton County,

John W. Peach, Judge - Case No. 78-18

William R. Slaughter, II of Slaughter and Slaughter, Live Oak, Florida; and James K. Jenkins, Atlanta, Georgia,

for Gluesenkamp, Appellant

Jim Smith, Attorney General, and Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida,

for Appellee

An Appeal from the Circuit Court in and for Hamilton County,

John W. Peach, Judge - Case No. 78-85-CF

Larry G. Turner of Turner and Morris, Gainesville, Florida,

for Massengale and Kring, Appellants

Jim Smith, Attorney General, and Carolyn M. Snurkowski, Assistant Attorney General, Tallahassee, Florida,

for Appellee

An Appeal from the Circuit Court in and for

Hamilton County,

John W. Peach, Judge - Case Nos. 78-65 & 78-66

David Roth of Cone, Owen, Wagner, Nugent, Johnson, Hazouri and Roth, West Palm Beach, Florida,

for Mouw and Hartwing, Appellants

Jim Smith, Attorney General, and Carolyn M. Snurkowski, Assistant Attorney General, Tallahassee, Florida,

for Appellee

APPENDIX B

SUPREME COURT OF FLORIDA

WEDNESDAY, JANUARY 14, 1981

DANIEL W. GLUESENKAMP, Appellant, v. STATE OF FLORIDA, Appellee.	*	CASE NO. 57,124 Circuit Court No. 78-18 (Hamilton)
HUBERT DWIGHT MASSENGALE, et al., Appellants, v. STATE OF FLORIDA, Appellee.	*	CASE NO. 56,928 Circuit Court No. 78-85-CF (Hamilton)
JOSEPH FRANCIS MOUW, et al., v. STATE OF FLORIDA, Appellee.	*	CASE NO. 57,131 Circuit Court Nos. 78-65 & 78-66 (Hamilton) CONSOLIDATED CASES

Upon consideration of the Motions for Rehearing filed in the above styled causes by the attorneys for Appellants.

IT IS ORDERED that said Motions be and the same are hereby denied.

BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur
SUNDBERG, C.J. and ADKINS, J., dissent

A True Copy

TEST:

Sid J. White

Clerk, Supreme Court

by:

Deputy Clerk

TC
cc: Hon. Alice Jones, Clerk
Hon. John W. Peach Judge

David Roth, Esquire
Larry G. Turner, Esq.
James K Jenkins, Esq.

William R. Slaughter, II, Esquire
Raymond L. Marky,Esq.
Carolyn Snurkowski, Esq.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JANUARY 27, 1981

DANIEL W. GLUESENKAMP,**

Appellant, **

**

v. **

** CASE NO. 57,124

STATE OF FLORIDA, **

Appellee. **

Appellant's Motion to Stay Issuance of Mandate is hereby denied.

A True Copy

TEST:
Sid J. White
Clerk, Supreme Court

C
cc:
James K Jenkins, Esq.
William R. Slaughter, II, Esq. of Slaughter & Slaughter
Raymond L. Marky, Esq.

APPENDIX D

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR HAMILTON COUNTY.

CASE NO. 78-18

STATE OF FLORIDA,

vs.

DAN W. GLUESENKAMP
Defendant

O R D E R

This cause coming on to be heard upon the Defendant's Motion to Dismiss; and the Court being otherwise fully advised in the premises, the Court finds:

(1)

That Section 570.15 of the Florida Statues is constitutional, and that said Statute does not, generally or as applied

to the facts of this case, deprive the Defendant of due process, or equal protection of the laws.

THEREFORE, it is after due consideration

ORDERED AND ADJUDGED that the Motion to Dismiss be, and the same is hereby denied.

DONE AND ORDERED in Chambers in Perry, Florida, this 17th day of July, A.D. 1978.

/s/_____

CIRCUIT JUDGE

Original: Clerk

Copies: Mr. Slaughter
Mr. Rudser

FILED 7-20-78

By/s/_____

APPENDIX E

IN THE CIRCUIT COURT,
HAMILTON COUNTY, FLA.
FALL TERM 1978
CASE NO. 78-18

STATE OF FLORIDA, Count I

vs.

DAN W. GLUESENKAMP
Defendant

JUDGMENT AND SENTENCE

The Defendant Dan W. Gluesenkamp being personally before this Court, represented by William R. Slaughter, II, his attorney of record,

having

entered a plea of Nolo Contendere to the crime of

Possession +100 Lbs. Cannabis to Sell

and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant Dan W. Gluesenkamp is hereby adjudicated guilty of the

crime of Possession +100 Lbs Cannabis to Sell. It is the sentence of the law that said Defendant be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of Five (5) Years. After serving ** in the institution in the State Correctional System to which said Department may cause you to be confined. [The Court recommends that you be confined at_____type institution.]

It is further ordered that you shall be allowed 1 Day credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense.

It is further ordered that the Sheriff of Hamilton County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24 Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date and the Defendant's entitlement to the assistance of counsel in taking this appeal [illegible] Defendant was entitled to an attorney at the expense of the State.

**Eighteen (18) months and paying a fine of $5,000.00, Defendant to be released on Probation for remainder of Sentence.

The following are the fingerprints of the above-named Defendant.

DAN W GLUESENKAMP

(FINGERPRINTS)

DONE AND ORDERED IN Open Court at Jasper, Hamilton County, Florida this 12th day of October, A.D. 1978.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgement and Sentence are the fingerprints of the Defendant Dan W. Gluesenkamp and that they were placed thereon by said Defendant in my presence in Open Court this date.

/s/
JUDGE

APPENDIX F

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 570.15
Florida Statutes (1977)

Access to places of business and vehicles

(1)(a) The commissioner, assistant commissioner, directors, counsel, experts, chemists, agents, inspectors, road-guard inspection special officers, and other employees and officers of the department shall have full access at all reasonable hours to all:

1. Places of business;
2. Factories;
3. Farm buildings;
4. Carriages;
5. Railroad cars;
6. Trucks;
7. Motor vehicles, other than private passenger automobiles with no trailer in tow, or any vehicle bearing an RV license tag;
8. Truck and motor vehicle trailers;
9. Vessels; and
10. All records pertaining thereto;

used in the production, manufacture, storage, sale, or transportation within the state of any food product; any agricultural, horticultural, or livestock product; or any article or product with respect to which any authority is conferred by law on the department.

(b) If such access be refused by the owner, agent, or manager of such premises or by the driver of such aforesaid vehicle, the inspector or roadguard inspection special officer may apply for and may execute a search warrant, which shall be obtained as provided by law for the obtaining of search warrants in other cases, or may conduct a search of any of the aforesaid vehicles without a warrant pursuant to s.933.19.

(c) Such departmental officers, employees, and road-guard inspection special officers may examine and open any package or container of any kind containing or believed to contain any article or product which may be transported, manufactured, sold, or exposed for sale in violation of the provisions of this chapter, the rules of the department or the laws which the department enforces and may inspect the contents thereof and take therefrom samples for analysis.

(2) It shall be unlawful for any truck or any truck or motor vehicle trailer to pass any official road guard inspection station without first stopping for inspection. A violation of this subsection shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Every law enforcement officer is authorized to assist employees of the department listed in subsection (1) in the enforcement of subsection (2). Such officer is authorized to stop and detain any vehicle and its driver who has failed to comply with subsection (2) until an employee of the department arrives to conduct the inspection required by law. Such law enforcement officer or a road guard inspection special officer may require the driver to return with his vehicle to the road guard inspection station where the driver failed to stop the vehicle for inspection.

(4) No civil or criminal liability shall be imposed upon any person who is authorized to enforce or assist in enforcement of the provisions of this section and who is lawfully engaged in such activity.
Amended by Laws 1975, c. 75-215, § 1, eff. July 1, 1975; Laws 1978, c. 78-180, § 1, eff. June 8, 1978; Laws 1979, c. 79-371, § 1, eff. July 3, 1979.

Florida Statutes:

320.06 Registration; revalidation stickers; license plates transferable; transfer fee; replacement plates

(1) Upon the filing of such application, the department shall assign to such motor vehicle, trailer, or semitrailer a registration license number and issue and deliver to the owner a certificate of registration and one registration license plate for each vehicle so registered.

(a) Registration license plates shall be issued for three-year periods beginning July 1, 1974, and each consecutive third year thereafter. During the two interim years, the department shall issue annual revalidation stickers for attachment to registration license plates.

(b) Beginning July 1, 1974 and thereafter, the registration license plates and certificates of registration shall be issued to and remain in the name of the owner of each vehicle registered and may be transferred by the owner from the vehicle for which the registration license plate was issued to a comparable vehicle the owner may acquire, subject to procedures set forth in subsection (2).

(2) Before an owner of a motor vehicle, trailer, or semitrailer shall sell, trade, transfer, or otherwise dispose of a motor vehicle, trailer, or semitrailer, the registration license plate thereon shall be removed, retained or destroyed by the owner, or transferred to a replacement motor vehicle, trailer, or semitrailer. No registration license plate shall be removed from any motor vehicle, trailer, or semi-

trailer to which it was issued and temporarily or permanently attached to any new or used replacement or substitute vehicle during any part of any unexpired registration year without first filing an application for transfer of such registration license plate and paying the transfer fee of $4.50 to the department.

(a) No registration license plate shall be transferable from a vehicle designated by any one subsection of § 320.08 to another vehicle within the designation of any other subsection of § 320.08 or § 320.081. Registration license plates for vehicles designated in § 320.081 shall be transferable only to replacement vehicles within that designation. No registration plates which are identified by letter series "R," "Q," "E," "S," "P," "GW," "K," "MF," "MI," "MT," "X," or "C," designated in § 320.08 shall be transferred except to a replacement vehicle which falls within the requirements under which such registration license plate was originally issued.

(b) A surviving spouse of a registered owner of any motor vehicle may, subject to approval of the county judge's court or a probate court and upon payment of a transfer fee of $4.50, request a registration certificate and transfer of registration license plate to his or her name for the remainder of a yearly registration period.

(c) It is unlawful for any person, firm, organization, or corporation authorized to make application for transfer of registration to fail to forward or cause to be forwarded to the department such application before transferring a registraiton license plate from any motor vehicle, trailer, or semitrailer to any other

vehicle owned by the same person, firm, organization, or corporation. Any person violating the provisions of this section shall be subject to the penalties provided in § 320.57.

(d) If a new or used replacement motor vehicle, trailer, or semitrailer is of the same weight or length classification as the originally owned motor vehicle, trailer, or semitrailer, classified in the same subsection of §§ 320.08 and 320.081, and currently licensed, no additional tax other than the transfer fee of $4.50, accompanied by an application for transfer on a form supplied by the department, shall be required to transfer a registration license plate to a comparable replacement vehicle for the duration of a current registration period and to issue a new certificate of registration.

(e) If the new or used replacement motor vehicle, trailer, or semitrailer is of a greater weight or length than the vehicle to be replaced and is classified in §§ 320.08 and 320.081 as requiring a registration license tax greater than for the original vehicle to be replaced, then the original license plate shall be surrendered in exchange for a plate of the appropriate weight series, and an amount representing the difference in the tax required shall be paid for the remaining months of the registration period, provided such remaining portion exceeds one month. Such payment shall be in addition to the transfer fee as authorized in this section. The minimum charge for issuance of license plates, provided in § 320.14, shall not apply to exchange of license plates under this section.

(f) If the new or used replacement motor vehicle, trailer, or semitrailer is of a lesser weight or length classification than the motor vehicle, trailer, or semitrailer designated in § 320.08 or § 320.081, to be replaced during the current registration period, no tax previously paid for the originally issued registration license plate and certificate of registration shall be refunded, but a transfer fee of $4.50 shall be paid with the application for transfer of the registration license plate and new certificate of registration, and the original license plate shall be surrendered for a plate of the appropriate weight series.

(3) The registration certificate or an official copy thereof, or a true copy of a rental or lease agreement issued for a motor vehicle, trailer, or semitrailer or issued for a replacement vehicle in the same registration period, shall, at all times while the vehicle is being used or operated upon the highways or streets of Florida, be in possession of the operator thereof or carried in the vehicle for which issued, and shall be exhibited upon demand of any authorized law enforcement officer or any agent of the department. No person charged with violating this subsection shall be convicted or fined if the operator produces in court a copy of such registration certificate valid at the time of his or her arrest.

(4) Registration license plates shall be of metal specially treated with a retroreflective material as specified by the department. Such registration license plate is designed to increase nighttime visibility and legibility and shall be at least six inches wide and not less than twelve

inches in length, and shall show the last two digits of the registration year of issue at the upper left corner of the registration license plates; and for each of the two subsequent years, a revalidation sticker issued annually shall be attached to the upper right corner of the license plate. The registration license plate shall be imprinted with numerals to identify the county wherein the plate is issued and with letters to identify "series" as described in § 320.08, followed by bold numerals or letters or combinations thereof to identify the registration license plate numer. The license plate shall also be imprinted with the three words, "Florida Sunshine State."

(5)(a) Revalidation stickers shall be issued in lieu of metal registration license plates for the two successive registration periods following the annual registration period in which metal registration license plates are issued. Owners of motor vehicles, trailers, or semitrailers submitting required tax and fees and requesting registration license plates for motor vehicles, trailers, and semitrailers not previously registered, when metal registration plates were issued, shall be issued a registration license plate with a current valid revalidation sticker attached.

(b) Revalidation stickers shall be metal tabs or material that will adhere to metal registration license plates, and shall be imprinted with the last two digits of the registration year for which issued and shall be serially numered.

(6) An additional sum of 5 cents shall be added and collected on each motor vehicle license plate sold in this state in

order to provide that all Florida license plates shall be treated with retroreflective material. Beginning July 1, 1971, this additional sum shall be increased to 25 cents in order to provide that all Florida license plates shall be fully reflectorized. Beginning July 1, 1974 and annually thereafter, this sum shall be increased to 50 cents to provide for reflectorization of metal license plates and revalidation stickers, whether issued individually or as a single unit.

(7) Any owner of a registered motor vehicle, trailer, or semitrailer, upon filing in the office of the department an application accompanied by a fee of $2, may obtain:

(a) A replacement registration license plate upon surrender of the old plate for cancellation; or

(b) A replacement registration license plate with current applicable validation stickers attached, plus a certificate of registration, upon surrender of the old license plate and validation stickers required to be attached for the current validation period, plus the certificate of registration or official copy thereof.

(8) In order to enable the division of corrections of the department of health and rehabilitative services to manufacture the three year license plates authorized herein, the department of highway safety and motor vehicles is hereby authorized to prepay to the division of corrections the amount required to purchase the materials needed for the manufacture of reflectorized license plates. The amount prepaid shall not exceed the amount of the appropriation

made to the department of highway safety and motor vehicles, but shall be sufficient to enable the division of corrections to meet the responsibilities required by the legislature through enactment of this legislation.

Section 933.19
Florida Statutes (1977)

Searches and seizures of vehicles carrying contraband or illegal intoxicating liquors or merchandise

(1) The provisions of the opinion rendered by the supreme court of the United States on March 2, 1925, in that certain cause wherein George Carroll and John Kiro were plaintiffs in error and the United States was defendant in error, reported in 267 United States Reports, beginning at page 132, relative to searches and seizures of vehicles carrying contraband or illegal intoxicating liquors or merchandise, and construing the fourth amendment to the constitution of the United States, are adopted as the statute law of the state applicable to searches and seizures under § 12, Art. I of the state constitution, when searches and seizures shall be made by any duly authorized and constituted bonded officer of this state exercising police authority in the enforcement of any law of the state relative to the unlawful transportation or hauling of intoxicating liquors or other contraband by the laws of the state.

(2) The same rules as to admissibility of evidence and liability of officers for illegal or unreasonable searches and seizures as wer laid down in said case by the supreme court of te United States shall apply to and govern the rights, duties and liabilities of officers and citizens in the state under the like provisions of the Florida constitution relating to searches and seizures.

(3) All points of law decided in the aforesaid case relating to the construction or interpretation of the provisions of the constitution of the United States relative

to searches and seizures of vehicles carrying contraband or illegal intoxicating liquors or merchandise shall be taken to be the law of the state enacted by the legislature to govern and control such subject.

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Appendix to Petition for Writ of Certiorari to the Florida Supreme Court upon the Florida State's Attorney, Jim Smith, The Capitol, Tallahassee, Florida.

This day of March, 1981.

JAMES K. JENKINS

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 80-1573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL W. GLUESENKAMP,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

THE INITIAL STOP AND SUBSEQUENT ARREST OF THE DRIVER OF PETITIONER'S TRUCK WAS NOT ARBITRARY OR UNREASONABLE FOR SAID ACTION WAS A LAWFUL EXERCISE OF THE POLICE POWERS OF THE STATE OF FLORIDA.

THERE IS NO CONFLICT BETWEEN THE DECISION SOUGHT TO BE REVIEWED AND DECISIONS RENDERED BY THIS COURT OR LOWER FEDERAL COURTS REGARDING THE SEARCH OF PETITIONER'S VEHICLE.

THE DECISION SOUGHT TO BE REVIEWED IS SUPPORTED BY THE EVIDENCE AND SECTION 570.15(2) AS CONSTRUED AND INTERPRETED BY THE FLORIDA SUPREME COURT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION OF THE COURT	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	4
QUESTION I	4
QUESTION II	11
QUESTION III	12
CONCLUSION	21

Page

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) — 4,5,7

Arkansas v. Sanders, 442 U.S. 753 (1979) — 15,16,19

Berry v. State, 316 So.2d 72 (Fla.1st DCA 1975) — 14

Carrol v. United States, 267 U.S. 132 (1925) — 15

Chambers v. Maroney, 399 U.S. 42 (1970) — 15

Delaware v. Prouse, 440 U.S. 648 (1979) — 4,7

Dixon v. State, 343 So.2d 1345 (Fla.2d DCA 1977) — 15

Eden v. State, 370 So.2d 826 (Fla.1st DCA 1979) — 5,16

Evans v. State, 368 So.2d 58 (Fla.1st DCA 1979) — 16,17

Flyn v. State, 374 So.2d 1041 (Fla.1st DCA 1979) — 16

Hicks v. Miranda, 422 U.S. 332 (1975) — 6

Knoble v. State, ___ So.2d ___,(Fla.1st DCA 1981), Opinion filed May 28, 1981 — 19

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) — 7

Page

Rawlings v. Kentucky, 12
___ U.S. ___, 65 L.Ed.2d 633(1980)

Rose v. Locke, 17
423 U.S. 48 (1975)

Shelton v. State, 15
349 So.2d 193 (Fla.2d DCA 1977)

State v. Bailey, 8
120 Ariz. 399, 586 P.2d 648
(Ct.App.1978)

State v. Toffolia, 15
349 So.2d 174 (Fla.1st DCA 1977)

Stephenson v. Department of Agriculture and Consumer Services, 6,13
342 So.2d 60 (Fla.1976)

Texas v. White, 15
423 U.S. 65 (1975)

United States v. Chadwick, 15,19
433 U.S. 1 (1979)

United States v. Jiminez, 15
626 F.2d 39 (7th Cir.1980)

United States v. Mackey, 15
626 F.2d 684 (9th Cir.1980)

United States v. Martinez-Fuerte, 5,6,20
428 U.S. 543 (1976)

United States v. Schaffer, 7
461 F.2d 856 (9th Cir.1972)

STATUTES

	Page
28 U.S.C. §1257(3)	1,18
§320.01, Fla.Stat.	1,18
§570.15(1)(a), Fla.Stat.	13,17,18
§570.15(2), Fla.Stat.	5,6,11,12, 13

OPINION BELOW

The decision of the Supreme Court of Florida was rendered on October 16, 1980, and is reported in 391 So.2d 192 (Fla.1981). A petition for rehearing was filed and subsequently denied on January 14, 1981.

JURISDICTION OF THE COURT

Respondent concedes that jurisdiction is properly being sought pursuant to 28 U.S.C. §1257(3) and to the extent that a substantial federal question is presented, this Court can exercise its jurisdiction.

STATUTORY PROVISIONS INVOLVED

Statutes of the State of Florida relevant to a disposition of the instant petition, in addition to those designated by petitioner are:

> 320.01 Definitions, general.—In construing these statutes, when applied to motor vehicles, and when the context permits, the word, phrase, or term:
> (1) "Motor vehicle" includes:
>
> * * *

(b) Recreational vehicle-type units primarily designed as temporary living quarters for recreational, camping, or travel use, which either have their own motive power or are mounted on or drawn by another vehicle. As defined below, the basic entities are:

1. "Travel trailer": A vehicular portable unit, mounted on wheels, of such a size or weight as not to require special highway movement permits when drawn by a motorized vehicle. It is primarily designed and constructed to provide temporary living quarters for recreational, camping, or travel use. It is of a body width of no more than 8 feet and a body length of no more than 35 feet when factory-equipped for the road.

2. "Camping trailer": A vehicular portable unit mounted on wheels and constructed with collapsible partial sidewalls which fold for towing by another vehicle and unfold at the campsite to provide temporary living quarters for recreational, camping, or travel use.

3. "Truck camper": A portable unit, designed to be loaded onto, or affixed to, the bed or chassis of a truck, constructed to provide temporary living quarters for recreational, camping, or travel use. Truck campers are portable units designed to be affixed to a truck chassis and constructed to provide temporary living quarters for recreational, travel, or camping use.

4. "Motor home": A vehicular unit built on a self-propelled motor vehicle chassis, primarily designed to provide temporary living quarters for recreational, camping, or travel use.

5. "Fifth wheel recreation trailer": A vehicular portable unit mounted on wheels of such size or weight as not to require special highway movement permits. It is primarily designed and constructed to provide temporary living quarters for recreation, camping, or travel use and designed to be connected for towing through the use of a fifth wheel device. It is of a length and width not exceeding the limitations provided in s. 316.515, as the same may be hereafter amended.

* * *

(13) "Trucks" includes any motor vehicle designed or used principally for carrying things other than passengers and includes a motor vehicle to which has been added a cabinet box, platform, rack, or other equipment for the purpose of carrying merchandise other than the person or effects of the passengers.

STATEMENT OF THE CASE

Respondent, for purposes of this reply, accepts the statement of the case as stated on pages seven through twenty-seven of the petition as being substantially accurate. Respondent will include in the argument portion of its brief additional facts deemed relevant for a proper determination of the jurisdictional question.

REASONS WHY THE PETITION SHOULD BE DENIED

QUESTION I

THE INITIAL STOP AND SUBSEQUENT ARREST OF THE DRIVER OF PETITIONER'S TRUCK WAS NOT ARBITRARY OR UNREASONABLE FOR SAID ACTION WAS A LAWFUL EXERCISE OF THE POLICE POWERS OF THE STATE OF FLORIDA.

Petitioner, relying upon this Court's recent decisions rendered in *Delaware v. Prouse*, 440 U.S. 648 (1979) and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), urges the stopping of the G.M.C. van being driven by Debra Cain was arbitrary and unreasonable and violative of *his* Fourth Amendment rights.

Petitioner has conveniently overlooked numerous facts relative to this case the most important of which was that the driver failed to stop at a *permanent* agricultural inspection station located on I-75 just south of the Georgia-Florida state line in

violation of Section 570.15(2) which makes it a misdemeanor of the second degree for *any* "truck" to fail to stop at said designated permanent inspection station. *Eden v. State*, 370 So.2d 826 (Fla.1st DCA 1979).

Pursuant to his statutory authority given by Section 570.151(2), Fla.Stat., Inspector Perry pursued petitioner's van. Upon stopping said vehicle and returning it to the inspection station, Perry placed *Cain* under arrest for violating 570.15(2).

Conspicuously absent from petitioner's brief is any reference to this Court's decision rendered in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) which distinguished *Almedia-Sanchez*, because the latter involved a roving patrol unit. In *Martinez* this Court made it abundantly clear that neither probable cause nor reasonable suspicion was required in order to conduct a stop and legitimate visual inspection of a

vehicle because such would be totally impractical to protect the government's legitimate interests. The Court rejected the argument advanced herein relative to the Fourth Amendment violations.

Also conspicuously absent from petitioner's brief is any reference made to the fact that in *Stephenson v. Department of Agriculture and Consumer Services*, 342 So.2d 60 (Fla.1976), this Court dismissed an appeal challenging the validity of the same statute ". . . for want of a substantial federal question. . . ." 434 U.S. 803 (1977). The State of Florida in *Stephenson* relied exclusively upon *Martinez* before this Court. Nothing has changed since that ruling and respondent submits there is still no substantial federal question regarding Sec. 570.15(2), Fla.Stat. Cf. *Hicks v. Miranda*, 422 U.S. 332 (1975).

Petitioner's reliance upon *Prouse* is likewise unavailing for in said case, which also involved roving-patrol units, this Court was careful to note in footnote 8b that:

> "Nor does our holding today cast doubt on the permissibility of roadside truck weigh-stations and inspection check-points, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others." 440 U.S. at 663

More importantly in *Prouse* this Court correctly observed that the methods employed by Delaware was not essential to protecting that State's admitted governmental interest. 440 U.S. at 659-661. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) has no application herein for this case does not involve a business establishment where time and circumstances are not critical. This Court recognized this distinction in *Almeida-Sanchez*, supra. See also: *United States v. Schaffer*,461 F.2d 856 (9th Cir.1972),

cert.denied, 409 U.S. 81 (1972) and *State v. Bailey*,120 Ariz. 399, 586 P.2d 648 (Ct. App. 1978).

Quite obviously if the state and federal government can require a particular type vehicle to stop at inspection stations, they may enact laws to enforce that governmental activity. Surely one cannot ignore the direction that they stop with impunity.

Counsel's statements that Inspector Perry used the statute as an investigatory tool rather than a regulatory one (Pet. at 29, 34) is totally unsupported by the evidence. No where in Perry's testimony on pages 31, 38-42 are there any statements which even remotely permit counsel to make such a claim. Not surprisingly, Perry admitted it was physically impossible to chase and arrest every truck operator that failed to stop at the inspection station and that the decision to do so was based upon a number of factors. As Mr. Perry stated:

> ". . . If I pursued every vehicle I would probably be out there right now. There is no way you could get every vehicle. . . ." (T 39)

Perry testified that in determining whether to attempt to stop a truck that does not voluntarily stop as required by the statute it depended on how busy he was at the time (T 38) and the visual observation of the vehicle. He said he attempts to stop ". . . the panel type vans, or the ones that you couldn't see through . . . [t]he ones that's got curtains around it and sitting down pretty low. . ." (T 39). These were the reasons given by Perry for chasing down petitioner's van when it failed to stop at the inspection station (T 46). Perry never asked for permission to *search* the vehicle he only asked to let him look inside to determine what he was hauling. (T 55). After returning to the inspection station and formally placing Debra Cain

under arrest, Inspector Perry called his supervisor (T 56) and awaited his arrival. He investigated nothing! Indeed, on cross-examination he testified his duties were to check agricultural products and not look for marijuana (T 64-65). Counsel's statement the statute in question is ". . . not regulatory but an excuse to allow law enforcement officers to investigate suspect vehicles. . ." (Pet. at 34) is pure nonsense. The inspection station is to conduct a limited inspection which is frequently granted by those who *do stop* which serves the public and legitimate governmental interest *or* to secure a warrant if appropriate and necessary where a visual inspection is denied. The fact that petitioner's vehicle did not stop and after the driver was arrested, others were called to determine what further actions should be taken does not establish the statute is not a regulatory statute.

The initial stopping of the van and arresting Debra Cain for violating Sec. 570.15(2) presents no substantial federal question.

QUESTION II

THERE IS NO CONFLICT BETWEEN THE DECISION SOUGHT TO BE REVIEWED AND DECISIONS RENDERED BY THIS COURT OR LOWER FEDERAL COURTS REGARDING THE SEARCH OF PETITIONER'S VEHICLE.

Petitioner is in error in stating that he was detained and the testimony of Inspector Perry clearly established that fact. Perry testified he arrested Debra Cain and detained the van (T 58) and he did not have anything to do with petitioner (T 60). The record shows the following:

> Q You had Ms. Cain. Your had Mr. Gluesenkamp, and you had a van. Were you to do anything with them until Garth got there?
>
> A I only had the driver and the van. I don't have much to do with the passengers. (T 60)

Of course he detained Ms. Cain and the van for she drove the vehicle past the station without stopping, but petitioner was never detained against his will, until *after* the seizure of the marijuana. The Florida Supreme Court so noted in its opinion. Since it is clear that the *petitioner* was not detained by the authorities, the argument that the delay violated his rights simply cannot be maintained. *Rawlings v. Kentucky*, ___ U.S. ___, 65 L.Ed.2d 633 (1980).

QUESTION III

THE DECISION SOUGHT TO BE REVIEWED IS SUPPORTED BY THE EVIDENCE AND SECTION 570.15(2) AS CONSTRUED AND INTERPRETED BY THE FLORIDA SUPREME COURT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The argument under this point is really a claim that Section 570.15 is unconstitutionally vague and denied petitioner equal protection of the law.

Respondent submits that this issue also fails to present a substantial federal question. It should be observed that the equal protection claim was presented to this Court in *Stephenson* and was rejected and this petitioner has presented nothing new for this Court to consider.

Section 570.15(2) requires all *trucks* to stop. Recreational vehicles are not "trucks" and are not required to stop. This case does not deal with the access provisions of Sec. 570.15(1)(a).

The officers never entered the vehicle until after probable cause was established and petitioner has not and does not question the existence of probable cause after the officers smelled the odor of marijuana eminating from the cargo door and observing the portion of burlap bag seen through the window of the van and the curtain. Petitioner, who stated he installed "*plants* in

stores and restaurants" which is what his van was used for, testified the curtain was tied to block the view into the back of the van (T 85). The witnesses for the state testified they did see the burlap because there was a crack in the curtain (T 5,7,71).

The trial judge in this case in denying the motion to suppress found:

> ". . . I find that probable cause is there for them to make a warrantless search, and I might add to this that it is satisfactory to me that they did view the sacks of marijuana in there and smell it. There was some question as to the difference of testimony. I rule that that is what I believe from the facts, and that these sacks, from the description of them, that we've had so many cases come through here of similar things, and the testimony has always been that they've been the same type. So eventhough they didn't see the marijuana material itself, their observation together with the smell is sufficient, and [I] overrule the motion. . . ." (T 100-101)

That finding of probable cause is clearly correct. *Berry v. State*, 316 So.2d 72 (Fla.

1st DCA 1975); *State v. Toffolia*, 349 So.2d 174 (Fla.1st DCA 1977); *Dixon v. State*, 343 So.2d 1345 (Fla.2d DCA 1977) and *Shelton v. State*, 349 So.2d 193 (Fla.2d DCA 1977).

Given the existence of probable cause, petitioner's van could be *searched* without a warrant and without regard to exigent circumstances and the Florida Supreme Court properly so held. *Carrol v. United States*, 267 U.S. 132 (1925); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Texas v. White*, 423 U.S. 65 (1975).

Petitioner's reliance upon this Court's decisions in *United States v. Chadwick*, 433 U.S. 1 (1979) and *Arkansas v. Sanders*, 442 U.S. 753 (1979) is totally without merit. Garbage bags and burlap bags are not protected by *Chadwick* and *Sanders*. *United States v. Mackey*, 626 F.2d 684 (9th Cir. 1980); *United States v. Jiminez*, 626 F.2d

39 (7th Cir.1980); *Flyn v. State*, 374 So. 2d 1041 (Fla.1st DCA 1979); *Evans v. State*, 368 So.2d 58 (Fla.1st DCA 1979) and *Arkansas v. Sanders*, supra, 442 U.S. at 764, n. 13.

Petitioner's vagueness claim based upon the notion that a van is not a "truck" is absurd. A "van" is nothing more than a fancy label attached by manufactures, distributors and advertisers to what everyone of common understanding knows is a panel-type truck. It should come as no surprise that the Florida courts have held that a "van" is a "truck", *Eden v. State*, 370 So. 2d 826 (Fla.1st DCA 1979) unless it is designed or used principally for carrying passengers and their effects--a bus either large or small or a recreational vehicle.

Petitioner's contention that the statute failed to provide adequate notice is legally

untenable for in 1977 the statutes of Florida authoritatively defined that term and the judicial interpretation in both *Evans* and the instant case was clearly forseeable. *Rose v. Locke*, 423 U.S. 48 (1975).

Interestingly, petitioner never contended his van was not a truck for the evidence and its use demonstrated the contrary.

Respondent respectfully submits the statute defining a "truck" as well as common sense would inform anyone of reasonable intelligence that a van such as involved in this case was a truck. In short, a rose by any other name smells the same.

Petitioner's claim that the "access" provision of Sec. 570.15(1)(a)7 to vehicles "other than private passenger automobiles with no trailer in tow or any vehicle bearing an RV license tag" creates an arbitrary and

unreasonable classification is superficially appealing but legally erroneous.

Section 570.15(1)(a) pertains to the department's *general* right of access to certain *places* and things and is not limited to the road-guard inspection stations. Subsection (2) is what commands vehicles to stop at a road-guard inspection station for inspection and it only requires a "truck" or "motor vehicle trailer" to stop.

Recreational vehicles in Florida are defined as units designed as temporary living quarters for recreational, camping or travel use and defined as a "travel trailer", "camping trailer", "truck camper", "motor home" or "fifth wheel recreation trailer." Section 320.01(1)(b)1.-5., Fla. Stat. These vehicles are not "trucks" as defined by Section 320.01(13) and are *not* required to stop whether they are Florida vehicles bearing a RV license plate or

out-of-state vehicles. Out-of-state recreational vehicles are not required to stop and their operators may not be arrested for failing to do so. *Knoble v. State,* ___ So. 2d ___ (Fla.1st DCA 1981), Opinion filed May 28, 1981. Neither do in-state recreational vehicles stop.

Of course, the reason the Florida Legislature has seen fit to exempt automobiles and recreational vehicles from stopping and being inspected, even though smugglers do in fact successfully transport marijuana and other controlled substances in those kinds if vehicles is very understandable as well as rational. First, the owners and operators of recreational vehicles, because they are "temporary living quarters", have a greater expectation of privacy in them. *United States v. Chadwick* and *Arkansas v. Sanders,* supra. Secondly, because of their character the brief visual

inspection which is all that could legally be authorized would not serve any useful purpose. The authorities would have to conduct a search of the various compartments and that simply would be beyond the police powers of the State of Florida. *United States v. Martinez-Fuerte*, supra, at 567.

The Florida Supreme Court's conclusion that the distinction between vehicles designed, maintained, or used for the carriage of property on the one hand and vehicles designed to carry people and effects of its passengers is reasonably related to the Department of Agriculture's legitimate inspection function and does not violate the equal protection clause is sound indeed.

CONCLUSION

Petitioner has totally failed to show the existence of a substantial federal question which merits the exercise of this Court's discretionary consideration. Accordingly, the petition should be denied.

Respectfully submitted,

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